(24,715)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 971.

ROME MILLER, PLAINTIFF IN ERROR,

vs.

EMIL J. STRAHL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 7, 1915.

1 No. 18021.

STRAHL
v.
MILLER.

Pleas before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 4th Day of January, 1915.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:
H. C. LINDSAY, *Clerk.*
VICTOR SEYMOUR, *Deputy Clerk.*

Be it remembered, That on the 16th day of April, 1913, there was filed in the office of the clerk of said supreme court, a certain transcript from the district court of Douglas county, Nebraska, the Amended Petition filed in said district court, Amended Answer, Reply to Amended Answer, Instructions of the Court, Verdict and Judgment of the said district court as appear by said transcript, being in the words and figures following, to-wit:

2 In the District Court of Douglas County, Nebraska.

114–99.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Amended Petition.

Plaintiff above named for his amended petition and cause of action against defendant above named, alleges:

1st. That heretofore at the times hereinafter mentioned defendant was the owner and proprietor, keeper and operator of a hotel building and hotel known as the Millard Hotel located at 13th and Douglas Streets in the city of Omaha, Nebraska and the said defendant had full charge and control of said hotel and building and operated

the same as an Inn for the accom-odation of guests and for furnishing such guests with sleeping apartments for compensation and the defendant carried on thereat, as an innkeeper, a general hotel business.

2nd. That defendant as such innkeeper received and entertained the plaintiff at said hotel as a guest for hire and while plaintiff was such guest, to-wit: on the night of January 22, 1911 up to and on and during the morning of January 23, 1911, he occupied as such guest a room on the 4th floor of said hotel. That said hotel at such time had more than 50 rooms and was four and more stories high.

3rd. That on the morning of said January 23rd between midnight and dawn and before six o'clock A. M. and while plaintiff was occupying said room as aforesaid, a hostile fire started and broke out in said hotel on one of the lower floors thereof and the same by reason of the hereinafter stated negligence of defendant was not promptly discovered, located or controlled and a portion of the hotel was burned and large quantities of smoke and gasses therefrom filled the rooms and halls and endangered the inmates. That defendant and each and all of his employees and servants in that behalf
3 negligently failed to awaken or give plaintiff notice of said fire or to do all in their power to save plaintiff, and thereby and by reason of the hereinafter stated negligence of the defendant, the plaintiff was then and there injured and damaged as hereinafter stated, by said smoke and gasses and in attempting to escape from said hotel in order to avoid said danger.

4th. That said fire, as aforesaid, broke out and was not discovered, located or controlled by defendant or his servants in that behalf, by reason of the carelessness and negligence of the defendant in not providing or maintaining a competent night watchman or an adequate watch service, and in not properly patrolling, examining or inspecting said hotel or searching for fire for the purpose of guarding against fire and safeguarding the guests, and by reason of the fact that the employees of the defendant in that behalf negligently and carelessly failed to be at their poses of duty and negligently and carelessly failed to promptly respond or act upon warnings given them and defendant of the existence of said fire. That defendant was further negligent and careless by reason of the failure of the defendant and his servants in that behalf, to promptly do anything to arrest the progress and volume of said fire, smoke and gasses and by reason of the negligence and carelessness of the defendant in failing to give his said employees instructions or directions to be observed in guarding against fire or in protecting the guests from danger by fire.

5th. That defendant was further guilty of negligence and carelessness in the premises in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire and that he did not promptly, as soon as the fire was discovered or at all, ring or cause to be rung a fire gong on said 4th floor, or ring or cause to be rung a telephone in the room occupied by plaintiff and in that he, nor his night watchman, nor any of his servants, did not awaken or rouse plaintiff or notify him of said fire, nor did any of
4 them do all in their power, or anything to awaken or save plaintiff.

6th. That there was a telephone in the room occupied by said plaintiff connecting his room with the office of the said hotel and the said defendant and his employees carelessly and negligently failed to make use of the said telephone for calling or arousing plaintiff and in this connection plaintiff alleges that the defendant and his employees were careless and negligent in that they did not keep an employee in the office of said hotel prior to and during the time of said fire for the purpose of safeguarding and protecting the guests and defendant and his employees were careless and negligent in that prior to and at the time of the said fire there was no employee of the said hotel in the office thereof to receive warnings of the said fire and to promptly convey warnings to the guests and to arouse and otherwise attend to the safety of said guests; that the defendant was guilty of carelessness and negligence in that he did not maintain a sufficient force of employees on the premises at the time of said fire or theretofore, to properly protect the guests of said hotel against danger from fire.

7th. That the defendant was further guilty of carelessness and negligence in that he did not give or cause to be given any notice to plaintiff as to the location of the stairway in said building leading from said 4th floor, nor did he have or maintain a sufficient number of such stairways or have any stairway properly located for plaintiff to escape. That he was guilty of carelessness and negligence in failing to operate the elevator leading to and from said 4th floor and in failing and refusing to respond to plaintiff's summons and demand to be removed from said 4th floor and in failing to direct plaintiff as to the way to escape and in that defendant did not have the hallway on said 4th floor sufficiently lighted and that he did not have any light, sign or notice of the location of the elevator.

8th. That upon awakening from sleep and then discovering all without any help from the defendant or his employees, that said hotel was on fire, said awakening and discovery to plaintiff being long after said fire was known to defendant and his servants in that behalf and after more than sufficient time had elapsed in which defendant and his servants could have, by the exercise of reasonable care and diligence awakened and notified him of said fire and permitted his safe escape from the peril thereof, plaintiff with due care on his part and in order to escape from said peril, went from his room into the hallway on said 4th floor and used due diligence and care to find a means of safe escape, but being unable, by reason of the aforesaid negligence of defendant, to escape by way of the elevator or to find any stairway or other means of escape, plaintiff was forced, by reason of the aforesaid negligence, to return to his room. That up to this time plaintiff had by reason of the aforesaid negligence of defendant, breathed large quantities of smoke and gasses and was thereby rendered dazed, weak and sick. That there was in plaintiff's room at said time, a rope furnished by defendant, which defendant negligently represented could be used for the purpose of escape from said room through the window thereof to the ground. That defendant then and there negligently furnished a rope which was unsafe too small and insufficient for the purpose for which in-

tended and negligently failed to give proper directions for the use thereof and to use the same was hazardous, and dangerous, but by reason of the aforesaid negligence of defendant, no other means was made known to plaintiff or could be found or used by him and under stress of his condition, surrounding- and exeitement occasioned by the aforesaid negligence of defendant and to escape the imminent peril threatening plaintiff as aforesaid, he was compelled to use said rope and apparent means of escape and with due care on his part he attempted to excape by means of said rope to the ground, but by reason of the aforesaid negligence of defendant he was injured and fell in so doing, to his injury and damage hereinafter stated.

6 9th. That by reason of the aforesaid carelessness and negligence of defendant and his said employees plaintiff thereby received and suffered inflam-ation and congestion, friction burns on both hands, nervous chock, fracture of several bones of the right foot and ankle, communuted fracture and dislocation of the right ankle, spraining of the muscles and tendons, laceration and cutting of the nerves and blood vessels and bruises in the region of said injuries, and body bruises and lacerations. That he was thereby rendered sick, lame, deformed and disabled, he was compelled to go to a hospital for treatment, his leg was enclosed in a cast and he was and will be greatly inconvenienced, suffered, now suffers and will continue to suffer great pain of body and mind; that he was compelled to incur expenses for medical, surgical and hospital care and treatment in the sum of $400, and upwards and he will be compelled to incur further expense for future treatment; that at the time of said injuries plaintiff was a traveling salesman and was earning and he had an earning capacity of from $250 *or* $300 per month and by reason of said injuries he became wholly incapacitated and has lost 4 months' full time next following said accident and he has since lost additional time and will be compelled to lose further additional time to the value of $300 per month and his earning capacity and ability has been permanently impaired. That plaintiff's said injuries are serious painful and permanent, his ankle and leg have been thereby permanently enlarged, stiffened and weakened and he is rendered a cripple for life; that plaintiff has in the premises been damaged by defendant in the sum of $15,000.00 and upwards.

Wherefore plaintiff prays judgment against the defendant for $15,000.00 and costs.

EMIL J. STRAHL, *Plaintiff,*
By JNO. A. MOORE,
His Attorney.

7 STATE OF NEBRASKA,
County of Douglas, ss:

John A. Moore, being first duly sworn, says that he is attorney for the plaintiff; that plaintiff is a non-resident of and absent from Douglas county, Nebraska and affiant therefore verifies for him; that the allegations in the foregoing petition are true as affiant verily believes.

JNO. A. MOORE.

Enforsed: Doc. 114. No. 99. In District court of Douglas county Nebraska. Emil J. Strahl, Plaintiff vs. Rome Miller, Defendant. Amended Petition. Jno. A. Moore, H. S. Daniel, Attorneys for plaintiff. Filed in District court, Douglas county, Nebraska, December 14, 1911. Robert Smith, Clerk.

8 In the District Court of the State of Nebraska within and for the County of Douglas.

114-99.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Amended Answer.

Comes now the defendant in the above entitled cause and answering plaintiff's petition denies each and every allegation therein contained excepting such as may be hereinafter admitted to be true.

This defendant admits that the plaintiff was a guest of the Millard Hotel on the night of January 22, 1911, and occupied a room located on the fourth floor which is the fifth story of said hotel building.

Defendant further alleges that any injuries which plaintiff may have received on the night of January 22, 1911, while a guest at said Millard Hotel were due and owing to and caused by the negligence of said Emil J. Strahl as hereinafter stated, and which said negligence directly contributed to and caused said injuries and without which said negligence of the said Emil J. Strahl said injuries would not have been received by him; that said Emil J. Strahl during four years prior to January 22, 1911, had been a regular guest at said Millard Hotel, stopping there on the average of eight or ten time- in each year, and had occupied various rooms in said hotel including rooms located on the aforesaid fourth floor of said hotel building; that said hotel building on the night of January 22, 1911, and during the four years prior thereto was fully equipped with fire escapes located on the outside of said building, had signs on the walls of the halls of said hotel showing the location of said fire escapes, had incondescent red electric lights running day and night in all the halls of said hotel and showing the location of said fire
9 escapes; that on the night of January 22, 1911, and all of the four years preceding said time said hotel building had more than two stairways leading up to the third floor or four story thereof, and had two stairways leading to the fourth floor or fifth story of said hotel building; that on the night of January 22, 1911 and for two years prior thereto every guest room in said hotel on and above the second floor thereof was equipped with a rope fire escape; that on the night of January 22, 1911, and for four years prior thereto it was the custom in said hotel not to have an elevator boy employed for the sole purpose of operating the elevator after 1

A. M. but said elevator would be operated after 1 A. M. only occasionally and when the duties of the bell boy who was employed to operate the telephone system in said hotel, would not require his attention and time for the operation of said telephone system; that said Emil J. Strahl had many an opportunity both on the night of January 22, 1911, and during the four years prior thereto to acquaint himself with the means and methods of egress from said hotel in the event of fire, but the said Emil J. Strahl carelessly and negligently failed to acquaint himself on the night of January 22nd, 1911, or prior thereto with the means of egress from said hotel and to acquaint himself with the location and situation of the fire escapes, and stairways and the method and manner in which the rope fire escapes were operated, and owing to such carelessness and negligence on the part of said Emil J. Strahl as above stated said Emil J. Strahl received whatever injuries he suffered on the morning of January 23, 1911.

Wherefore defendant prays that said cause be dismissed and that it recover its costs herein expended.

EDGAR M. MORSMAN, JR.,
Attorney for Defendant.

10 STATE OF NEBRASKA,
County of Douglas, ss:

Rome Miller being first duly sworn on his oath says he is the defendant in the above entitled cause; that he has read the foregoing answer; knows the facts therein stated and believes the same to be true.

ROME MILLER.

Subscribed in my presence and sworn to before me this 4th day of November, A. D. 1912.

CHARLES LESLIE, *Judge.*

Endorsed: Doc. 114. No. 99. In the District Court of the State of Nebraska, within and for the County of Douglas. Emil J. Strahl, Plaintiff, vs. Rome Miller, Defendant. Amended answer. Clerk's Fees $.50, Paid by Morsman. Filed in District Court, Douglas county, Nebraska. November 4, 1912. Robert Smith, Clerk.

11 In the District Court of Douglas County, Nebraska.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Reply to Amended Answer.

Comes now the plaintiff and for his reply to the amended answer of the defendant, he denies each and every allegation in the plea of contributory negligence in said Amended answer contained and he

denies that he was guilty of contributory negligence and he denies that he was negligent in any manner.

Wherefore Plaintiff prays as in his petition.

JNO. A. MOORE,
Attorney for Plaintiff.

STATE OF NEBRASKA,
County of Douglas, ss:

Emil J. Strahl, being first duly sworn deposes and says that he is the plaintiff named in the above entitled action; that he has read the foregoing reply to the amended answer of the defendant and the facts therein stated are true as he verily believes.

EMIL J. STRAHL.

Subscribed in my presence and sworn to before me this 8th day of November 1912.

[SEAL.] H. S. DANIEL,
Notary Public.

Endorsed: Doc. 114. No. 99. In District Court of Douglas county Nebraska. Emil J. Strahl, Plaintiff vs. Rome Miller, Defendant. Reply to amended answer of Defendant. Clerk's Fees $.50, Paid by John A. Moore, Attorney for plaintiff. Filed in District Court, Douglas county, Nebraska. November 8, 1912. Robert Smith, Clerk.

12 In the District Court of Douglas County, Nebraska, October Term, 1912.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Instructions by the Court.

1. Plaintiff brings this action to recover from the defendant the sum of $15,000 on account of damages for injuries sustained by him, and alleges that the defendant was the owner and proprietor and keeper and operator of what is known as the Millard Hotel, located at 13th and Douglas streets in the city of Omaha, Nebraska, and that as such proprietor of said hotel, he received and entertained the plaintiff as a guest for hire, and that on the night of January 22, 1911, and during the morning of January 23, 1911, said plaintiff occupied a room on the Fourth Floor of said hotel; that said hotel at said time had more than 50 rooms, and was four or more stories high.

The plaintiff further alleges that on the morning of January 23rd, between midnight and dawn, and while plaintiff was occupying said room, a hostile fire started and broke out in said hotel, and by

reason of the negligence of the defendant, and was not properly discovered or controlled, and a portion of the hotel burned, and the halls thereof were filled with large quantities of smoke and gases endangering the lives of the guests and inmates; that defendant and his employes and servants failed and neglected to awaken or give notice to the plaintiff of the existence of said fire, and that, by reason thereof, the plaintiff was injured by said smoke and gases and in attempting to escape from said hotel.

The plaintiff charges the defendant specifically with negligence in the following particulars:

1. That the defendant failed and neglected to maintain a
13 competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests and that the employes of the defendant negligently and carelessly failed to be at their posts of duty to respond to the warnings given them and the defendant of the existence of the fire.

2. That the defendant was further guilty of negligence in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung, a fire gong on the fourth floor or ring or cause to be rung a telephone in the room occupied by the plaintiff, or in any other way awaken or arouse the plaintiff or notify him of the existence of said fire.

3. That the defendant was guilty of carelessness and negligence in not giving or causing to be given any notice to plaintiff as to the location of the stairway leading from the fourth floor, and did not have or maintain a sufficient number of stairways; and that he was negligent in failing to operate the elevator leading to and from the fourth floor and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign or notice indicating the location of the elevator. And,

4. That plaintiff's room was provided with a rope furnished by defendant, which defendant represented could be used for the purpose of escaping from said room in case of fire, and that said rope so furnished as a means of escape was too small and was insufficient for the purpose for which it was intended, and that defendant negligently failed to give plaintiff proper directions for the use of said rope as a means of escape.

Plaintiff further alleges that, by reason of the negligence of defendant and his employes, plaintiff sustained injuries which resulted
in his being damaged in the sum of $15,000 and prays judg-
14 ment against the defendant for that amount, and costs.

The defendant for answer to the petition of the plaintiff denies each and every allegation, except such as are admitted to be true by the defendant; and alleges that any injuries which plaintiff may have received while a guest at said *n*otel and while attempting to escape therefrom were due to and caused by the negligence of plaintiff and without said negligence on the part of said plaintiff, said injuries would not have been received by him.

The defendant further alleges that the said plaintiff during four years prior to January 22, 1911, had been a regular guest at said hotel, stopping there on an average 8 or 10 times a year; that he had occupied various rooms in said hotel during said time, including rooms on the fourth floor; that said hotel building on the night of January 22, 1911, and during the four years prior thereto had been fully equipped with fire escapes located on the outside of the building; that signs were painted on the walls of the halls of said hotel indicating the location of said fire escapes that incandescent red electric lights had been kept burning during the day and night in all of the halls of said hotel showing the location and direction of the said fire escapes, and that, on the night of January 22, 1911, and on all of the four years preceding said time, said hotel building had more than two stairways leading from the fourth story of said building, and that on the night of January 22, 1911 and for two years prior thereto, every guest room in said hotel on and above the second floor had been equipped with a rope fire escape.

Defendant further alleges that for four years prior to January 22, 1911, it had been the custom in said hotel not to have an elevator boy employed for the sole purpose of operating the elevator after 1:00 a. m., but that said elevator had been operated after one a. m., only occasionally; that said plaintiff had had ample opportunity on the night of January 22, 1911, and prior thereto, during the four years that he had frequented said hotel, to acquaint himself with the means and methods of egress from said hotel in the event of fire, but that he had negligently failed to acquaint himself with the means of egress from said hotel, and to acquaint himself with the location and situation of all fire escapes and stairways and the method and manner in which the rope fire escapes were operated, and that it was owing to such negligence on the part of the plaintiff that he received whatever injuries he suffered on the morning of January 23, 1911.

By way of reply, plaintiff denies each and every allegation in defendant's plea of contributory negligence and denies that he was guilty of contributory negligence or any negligence.

Given.

CHARLES LESLIE, *Judge.*

2. The law of this state, in so far as the same has any application to this case, requires that the proprietor of every hotel being four or more stories high shall keep at least one competent watchman between the hours of 9:00 o'clock P. M. and 6:00 o'clock A. M., whose duty it shall be to keep watch and guard in such hotel against fire, and give warning in case a fire should break out to all guests and other persons therein; and, further, that a large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates in case of fire and to do all in their power to save guests and inmates.

It further provides that all buildings, used for hotel purposes, more than two stories high shall be provided with one or more fire-proof stairways constructed on the outside and placed in such

position and as many in number as may be designated by the Commissioner or deputy commissioner of labor.

Given.

CHARLES LESLIE, *Judge.*

2½. You are instructed that the failure to perform a legal duty, such as stated in these instructions, on the part of one who has that duty to perform toward another, constitutes negligence, provided such failure is one such as a reasonably prudent and careful
16 man would not make under the circumstances shown in the evidence.

Given.

CHARLES LESLIE, *Judge.*

3. The burden of proof is upon the plaintiff to show, by a preponderance of the evidence, that he was a guest for hire, at the Millard Hotel on the night in question; that the fire occurred; that he sustained the injuries complained of, and by reason thereof suffered damages; and that the proximate cause of his injuries and resulting damages were due to the negligence of the defendant or his employees.

By negligence is meant the doing of some act which a man of ordinary prudence would not have done under the circumstances or the failure to do some act or take some precaution which a man of ordinary care and prudence would have done or taken in the circumstances.

Given.

CHARLES LESLIE, *Judge.*

4. The burden of proof is upon the defendant to establish by a preponderance of evidence that the plaintiff was guilty of negligence directly contributing to plaintiff's alleged injuries, and that said negligence was the proximate cause thereto.

The court instructs you that the test of contributory negligence in this case is whether the plaintiff conducted himself as a person of ordinary intelligence and prudence would have under all the facts and circumstances as disclosed by the evidence adduced herein; and in this regard you are instructed that one awakened from sleep and confronted with apparent danger, such for instance as finding the hallway and rooms filled with smoke, is not expected in the presence of such danger or apparent danger to exercise the same degree of prudence or judgment that one would usually exercise under ordinary conditions.

The plea of negligence on the part of defendant which it is claimed contributed to the injury of the plaintiff is limited to the charge that plaintiff carelessly and negligently failed to acquaint himself
17 with the means of egress from said hotel and with the location and situation of the fire escapes and stairways and the manner and method in which the rope fire escape was operated, and carelessly and negligently operated said rope fire escape.

In considering the question of contributory negligence on the part of the plaintiff, you must confine yourselves to the specific negligence charged. Before such negligence could of itself prevent recovery by plaintiff, you must find from a preponderance of the evidence that it directly contributed to plaintiff's injury and was the proximate cause thereof.

Given.

CHARLES LESLIE, *Judge.*

5. Before you can find for the plaintiff, you must be satisfied by a preponderance of the evidence that the defendant or some one of his employees connected with the management or operation of the hotel was guilty of some act of negligence which was the immediate or proximate cause of the plaintiff's injuries if you find he sustained injuries on the night in question as alleged in his petition.

The mere fact that the accident occurred while the plaintiff was a guest at the hotel managed or operated by defendant and that the plaintiff sustained injuries of themselves give him no right of recovery. He must go further and show that negligence on the part of the defendant or his agents or employees was the proximate cause of said alleged injuries.

Given.

CHARLES LESLIE, *Judge.*

6. If you find from a preponderance of the evidence that the defendant knew or by the exercise of reasonable diligence could have known of the existence of the fire in the building in time to have awakened the plaintiff and rescued him from his position of danger by enabling him to descend to the lower part of the building by using the stairs or elevator, or other usual method, and that defendant failed to so awaken or notify said plaintiff, and that
18 defendant's failure to do so was the proximate cause of the plaintiff's injuries without any negligence on the part of the plaintiff contributing thereto, then the defendant is liable in damages, and your verdict should be for the plaintiff.

If you find that the defendant was guilty of negligence in not notifying the plaintiff in time to have enabled him to descend to the lower floors by the usual means but nevertheless find from the evidence that plaintiff was also guilty of negligence that directly contributed to the cause of the injuries alleged to have been sustained by the plaintiff, then the defendant is not liable and your verdict should be for the defendant.

Given.

CHARLES LESLIE, *Judge.*

7. One of the charges of negligence against the defendant is that the rope fire escape in the room occupied by the plaintiff was not long enough to reach to the platform and that the clamp or device through which the rope passed and which is designed to regulate the speed with which one using it would descend did not work and by reason

thereof plaintiff in attempting to use this escape, was unable to regulate the speed of his descent, and, after reaching the end of the rope, dropped a distance of some 14 feet to the platform.

If you are satisfied from a preponderance of the evidence that the said rope fire escape was defective in either of the aforesaid particulars and that the injuries, if any, sustained by the plaintiff were directly due to these defects or either of them, then the defendant is liable, and your verdict should be for the plaintiff, even though you might also find from the evidence that there were other means of escape open to the plaintiff which ordinarily would be considered safer than the one used by plaintiff. In other words, the plaintiff would not be responsible for a mere mistake of judgment in choosing between different fire escapes or means of descending to the street or
19 lower floor, if he was confronted with danger or apparent danger, such as finding the hallway full of smoke would naturally indicate.

If you are satisfied from the evidence, however, that the rope fire escape was not defective in either of the aforesaid particulars and that it was a suitable appliance for the purpose for which it was intended and that the plaintiff, by the exercise of such care as a man of ordinary prudence in the circumstances as disclosed by the evidence would have exercised could have descended to the said platform or other place of safety without injury, and that the failure of the said plaintiff to exercise the care that a man of ordinary prudence would have exercised in the circumstances was the proximate cause of the alleged injury, then the defendant is not liable and your verdict should be for the defendant, even though you might also find that the defendant was n*g*eligent in not discovering the fire earlier or in not notifying the plaintiff promptly of its existence.

Given.

CHARLES LESLIE, *Judge.*

8. You are instructed that it was the duty of defendant to have and keep in the Millard Hotel on the night of the fire after nine o'clock P. M., at least one competent watchman, whose duty it was to keep watch and guard in such hotel against fire and if reasonably in his power, under the evidence and circumstances shown by the evidence, to give warning of the fire in said hotel and as soon as was reasonably possible awaken the plaintiff and inform him of such fire, and if you find from the evidence that the watchman failed to do so, without reasonable excuse for such failure, and it was reasonably in his power to do so and that such failure was a proximate cause of plaintiff's injury, without contributory negligence on p*a*lintiff's part, directly contributing to his injury, then you must find for plaintiff on the question of defendant's negligence in this regard.

Given.

CHARLES LESLIE, *Judge.*

20 9. You are instructed that if you find from a preponderance of the evidence under the instructions that the elevator was not operated during the fire and that reasonable and ordinary care

for plaintiff's safety required that it be operated and that the failure to operate it under all the circumstances shown in evidence, constituted negligence and that such failure was a proximate cause of plaintiff's injury, without negligence on his part directly contributing to his injury, then you must find for plaintiff and against defendant.

Given.

CHARLES LESLIE, *Judge.*

10. You are instructed that the defendant could not delegate to an agent or servant the duty which he owed to the plaintiff to use reasonable care for the safety of the plaintiff while in the hotel as defendant's guest, and thereby escape responsibility for the failure to perform or have performed the duty owing to plaintiff, and a failure by such agent or servant in that behalf, within the scope of his employment, would be in law, the failure of the defendant; and the personal absence of the defendant from the hotel the night of the fire can in no wise have any bearing to relieve him from exercising either through or by himself or his servants, reasonable and ordinary care for plaintiff's safety.

Given.

CHARLES LESLIE, *Judge.*

11. You are instructed that it was the duty of the defendant to have on each story of the hotel a large alarm bell or gong, in such condition and position to be used to alarm the plaintiff, while defendant's guest in said hotel, in case of fire therein, and to use the same for such purpose. And it was the duty of the defendant to give reasonable notice of the fire to the plaintiff as soon as it was reasonably in defendant's power to do so, and to do all reasonably in his power to save the plaintiff from injury by reason of such fire, and it was the duty of the defendant to use reasonable care for the safety of plaintiff.

21 And if you find from the evidence that defendant failed to perform such duty, either through himself or his servants or agents, without reasonable excuse for failing to do so, and that such failure was a proximate cause of plaintiff's injury and plaintiff was without contributory negligence on his part, directly contributing to his injury, then you must find for plaintiff and against the defendant on the question of defendant's negligence.

Given.

CHARLES LESLIE, *Judge.*

12. It was the duty of the defendant to give notice or warning to the plaintiff of the existence of the fire as soon after its discovery as reasonably possible in the circumstances, and to use all reasonable means at his command to this end, such for instance as the telephone, gong, and elevator. But in this regard you are instructed that the defendant owed no greater duty to the plaintiff than he did to the other guests of the hotel, and if you are satisfied from the evi-

dence that defendant or his servants with reasonable promptness after discovering the fire, proceeded diligently with the work of notifying guests generally, as a man of ordinary prudence would have, but in the course of such work of notifying said guests generally throughout the hotel had not for want of time or other reasonable excuse reached the plaintiff individually before the alleged accident, you will find that the defendant was not guilty of negligence in this particular, because of failure *of* notify plaintiff.

Given.

CHARLES LESLIE, *Judge.*

13. If you believe from the evidence under the instructions of the court, that the plaintiff is entitled to recover, then in fixing the damages which plaintiff ought to recover, you should take into consideration all the circumstances in the case, so far as they are shown by the evidence, such circumstances attending the injury, the extent of time plaintiff was incapacitated from work, if any; the loss of
22 earnings or time, if any, the injuries that he received that were the direct and proximate result of the injury, pain and suffering endured by him, and to be in future endured by him, if any, and the extent and duration of the injuries that were the direct and proximate result of the accident, and loss of earning capacity, if any, that was or will be, if any, the direct and proximate result of the injuries, and any loss of physical capacity, if any, that is the direct and proximate result of the injuries, and include therein such amount for expenses for hospital and physician's services as is the reasonable value for such services, if such expenses were incurred by plaintiff and reasonably necessary on account of such injury, and give plaintiff such damages as the jury believe from the evidence, said plaintiff has sustained, not exceeding the sum of $15,000.00.

Given.

CHARLES LESLIE, *Judge.*

14. The presumption without evidence in the first instance is that each party exercised due care, and this presumption continues throughout until the contrary is established by a preponderance of the evidence.

Given.

CHARLES LESLIE, *Judge.*

15. By a preponderance of evidence is meant not necessarily the greater number of witnesses; but a preponderance means that amount of evidence which, on the whole, produces the stronger impression upon the minds of the jury and convinces you of its truth when weighed against the evidence in opposition thereto.

Given.

CHARLES LESLIE, *Judge.*

15½. The court instructs the jury that by the term "proximate cause" is meant that cause which was the direct and immediate cause

that produced the result complained of, and without which that result would not have occurred.

Given.

CHARLES LESLIE, *Judge.*

23 16. The jury are instructed that you are the sole judges of the credibility of the witnesses, and the weight to be given to their testimony. And in determining the weight which the testimony of the witnesses is entitled to receive, the jury should take into consideration their interest in the result of the suit, if any, their conduct and demeanor while testifying; their relationship to the parties, if any such is shown; their apparent fairness or bias, if any such appears, their opportunities for seeing or knowing the things about which they testified, the reasonableness or unreasonableness of the statements made by them, and all other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses.

If you find that any witness has knowingly testified falsely with reference to any material fact in this case, then you are at liberty to disregard the entire evidence of such witness.

Given.

CHARLES LESLIE, *Judge.*

17. When you have retired to your room for deliberation you will select one of your number as foreman. When you have agreed upon a verdict, you will have your foreman sign the same, and return it, together with these instructions, into court.

If you do not agree upon a verdict by 10:30 p. m., you will be at liberty to separate for the night and come together again at nine o'clock tomorrow morning. But in such case you are warned not to permit anyone to talk to you about the case or talk about it in your presence, nor discuss it with each other until you reconvene for consideration of your verdict.

Should you agree upon a verdict while court is not in session, you will have your foreman sign it, enclose it in an envelope, and place it in the custody of your foreman, when you will be at liberty to separate but you will all be in court at the opening of its next session to return the verdict so agreed upon.

24 CHARLES LESLIE, *Judge.*

Given.

CHARLES LESLIE, *Judge.*

Endorsed: Doc. 114. No. 99. Emil J. Strahl, vs. Rome Miller. Instructions by the court. Charles Leslie, Judge. Filed in District court, Douglas county, Nebraska, November 11, 1912. Robert Smith, Clerk.

25 In the District Court of Douglas County, Nebraska.

114-99.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Verdict.

We the jury duly impaneled and sworn in the above entitled cause, do find for the said plaintiff and fix the amount of his recovery at $6,500.00, Six Thousand Five Hundred Dollars.

J. A. FUELLER, *Foreman.*

26 114-99.

EMIL J. STRAHL, Plaintiff,
vs.
ROME MILLER, Defendant.

Judgment.

This matter now coming on for hearing on the motion of the defendant for a new trial, and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, overruled, to which ruling the defendant duly excepts, and is given 40 days from the rising of the court in which to prepare and serve a bill of exceptions.

Heretofore to-wit: on the 12th day of November, 1912, the jury herein duly empaneled and sworn, returned its verdict in writing in favor of the plaintiff and assessed his damages in the sum of $6,500.00.

It is therefore considered, ordered and adjudged that the plaintiff Emil J. Strahl have and recover of and from defendant Rome Miller the sum of $6,500.00 together with interest thereon at the rate of 7% per annum from the 12th day of November 1912, and his costs herein expended taxed at $—.

27 Paragraph 1 of Rule 12 of the rules of the supreme court of the state of Nebraska in force at this time is in the words and figures following, to-wit:

28 12. Briefs—How prepared:

(1) Appellant's brief.—The brief of appellant shall consist of the statement of the case and the propositions of law relied upon, with authorities supporting them.

The statement of the case shall consist of:

(*a*) The nature of the case.

(*b*) The issues.

(*c*) How the issues and case were decided.

(*d*) The errors relied upon for reversal, with a concise statement, in connection with each point presented, or separately, as will best present the error relied upon, of the substance of so much of the record as is necessary to present each question to be determined, referring to the pages and paragraphs of the transcript and the page of the bill of exceptions and the number of the interrogatory.

If the insufficiency of the evidence to sustain the verdict or finding of fact or law is assigned, the statement shall contain a concise statement of the substance of the evidence bearing upon the point so presented, referring with particularity by question and page to the evidence in the record supporting the contention made. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party in his brief shall deny the correctness or accuracy of the statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard. Following this statement the brief shall contain the propositions of law relied upon as necessarily involved in the decision of the case; each proposition must be numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting
29 them must be cited with each proposition respectively.

Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof.

30 And afterwards, to-wit, on the 11th day of April, 1914, there was filed in the office of the clerk of said supreme court certain Assignments of Error, Assignments No. 3, 6, 8, 10, 12 and 13, being in the words and figures following, to-wit:

31 *Assignments of Error.*

* * * * * * *

3. The court erred in giving to the jury instruction No. 2 given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

Instruction No. 2½ should be considered as a part of instruction No. 2, and we shall so treat it in the making of our argument. Our objections to instruction No. 2 are based upon the following propositions:

(*a*) The court told the jury that it was the legal duty of the defendant as proprietor of the Millard Hotel to provide the building with one or more fireproof stairways constructed on the outside and placed in such position and as many in number as might be designated by the Commissioner of Labor, and that failure to perform such duty constituted negligence. There was absolutely not a syllable of testimony in the record showing that the Commissioner of Labor

had either prescribed the location or designated the number of fire escapes that should be placed upon this building. The uncontradicted testimony shows that the hotel was fully provided with metallic fireproof stairways; that there were six in number, three on the Douglas street side of the building, two on the alley side, and one in the east light court (bill of exceptions, pp. 655 and 646, also testimony of sundry witnesses who used the fire escapes the night of the fire). Granting there was a legal duty resting upon defendant to equip this hotel with fire escapes, and that violation of such duty gave a cause of action to plaintiff, still the evidence affirmatively shows that this duty was performed, and that there was no violation thereof. The court, therefore, submitted to the jury an issue of negligence based upon failure to equip the hotel with fire escapes when there was no evidence whatever to sustain such issue.

(*b*) The instruction permitted the jury to find for plaintiff if from the evidence they thought the watchman was either incompetent or negligent during the night of the fire. The same issue
32 was resubmitted to the jury by instruction No. 8. By instruction No. 10 the court again told the jury that the defendant was responsible for the negligence of the watchman. Defendant by its instruction No. 5 specifically requested the court to withdraw from the jury the question as to whether or not the night watchman was incompetent. Likewise by instruction No. 6 defendant requested the court to charge the jury that neglect of duty upon the part of the night watchman, Martin Woltman, would not make the defendant liable.

At common law the proprietor of a hotel owed no duty to rescue or protect a guest from fire. Fire was as much of a menace and danger to the proprietor's safety as it was to the safety of the guest, and the proprietor had the right to look out for the safety of himself and family and was not required to risk his own life or safety for the sake of his guest. In 1883 the Legislature passed an act regulating hotels, and portions of this act are still found in the Revised Statutes of 1913, as sections 3104, 3105 and 3106. That part of the statutes referring to the night watchman is as follows:

"3104, Sec. 11, * * * The proprietor * * * shall employ to keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9:00 o'clock P. M. and 6:00 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein and inform them of such fire."

Section 3105 provides that the proprietor of a hotel failing to comply with section 3104 shall be guilty of a misdemeanor and upon conviction thereof shall be fined.

Section 3106. "Should such watchman * * * fail to awaken the persons sleeping in such hotel he shall be deemed guilty of a misdemeanor."

33 There was no evidence in the record from which it could be inferred that Woltman was incompetent, and the question of his competency should have been withdrawn from the jury as

requested by defendant in its instruction No. 5. Woltman testified that he was on duty the night of the fire; that his duties required him to make the rounds of the A. D. T. boxes every hour, and this took him all over the hotel (bill of exceptions p. 72). Exhibit No. 1 introduced in evidence shows that Woltman made his rounds and reported from each A. D. T. box commencing at 10:30, commencing again at 11:30, commencing again at 12:30, commencing again at 1:30, and commencing again at 2:30. Woltman further testified that at 3:20 he was in the lobby of the hotel; that it was about time for him to start on the next round of the A. D. T. boxes; that from the lobby he could see the dining room door; that he saw a light through the door and at once ran and turned in the fire alarm (bill of exceptions 737); that he called all the people in the hotel he could (bill of exceptions p. 737). Mr. Clark saw Woltman in the halls upstairs knocking on the doors (bill of exceptions p. 675). His testimony is corroborated by Brotherington, who testified that the night watchman and the night clerk discovered the fire through the dining room door (bill of exceptions pp. 307, 308, 327). Mr. Clark testified that the night watchman was employed for the purpose of looking out for fires; that he had instructions to keep a lookout; that the night of the fire Woltman, the watchman, was on duty and made the rounds of the A. D. T. alarm boxes; that it took about twenty minutes to make one round and visit each A. D. T. box. in the hotel; that when not making his rounds Woltman did little odd jobs in the office (bill of exceptions pp. 22-24, 664); that the night watchman in making his rounds would have to be in the basement and on every floor; that there were 12 of these A. D. T. boxes located in the hotel; that the night watchman was instructed to keep a lookout for fire
34 in making these rounds; that Woltman made his rounds at 10:30, 11:30, 12:30, 1:30 and 2:30 and the A. D. T. report shows that the watchman faithfully performed his duties (bill of exceptions pp. 24-32, 664). There was absolutely no testimony showing any misconduct, incompetency or negligence on the part of Woltman prior to the night of the fire, hence there was no evidence from which the jury might infer that he was incompetent. For record of Woltman's rounds of the A. D. T. boxes see Exhibit 1 attached to page 754 of the bill of exceptions.

The evidence just referred to also shows that Woltman attended to all his duties the night of the fire, and there was no evidence from which the jury could infer that he was negligent. It was, therefore, error not only to submit to the jury the question of Woltman's incompetency, but it was also error to submit to the jury the question of Woltman's negligence, for there was no evidence to sustain such a charge.

(*c*) The statute does not contemplate that the proprietor of a hotel shall be liable for neglect of duty on the part of the night watchman, and therefore the jury should not have been instructed that the defendant was liable for Woltman's alleged negligence. Section 3105 of the statutes makes the proprietor guilty of a misdemeanor only in the event he fails to hire a competent watchman, and section 3106 makes the watchman liable for failure to awaken

the persons sleeping in the hotel. A proper construction of the statute does not make the proprietor liable in damages for the injuries caused by the watchman's misdemeanors.

(*d*) The statute is not to be construed as granting to third parties a civil cause of action for damages based upon a violation of the statute.

(*e*) The incompetency of Woltman and his alleged negligence are in no manner to be considered as the proximate cause of Strahl's injuries. Strahl was injured while making his escape and
35 while using the rope fire escape. The object of the statute in providing a watchman is for the purpose of giving warning to the guests of the hotel, but Strahl had plenty of notice of the fire, and his lack of warning from the watchman was not the proximate cause of his accident. Had Strahl properly used the rope fire escape he would have received no injury, and the proximate cause of his injuries was his negligence in the use of or the alleged defective condition of the rope fire escape. The testimony plainly shows that Strahl had as much notice and warning of the fire as he could possibly have received from Woltman.

Policemen and firemen were all over the building knocking on the doors and the manager of the hotel, the day clerk, the night clerk, and other employees were all over the hotel kicking and knocking on the doors. None of the employees of the hotel was idling around (bill of exceptions, pp. 674-675-678). Ellis testified he heard knocking on the doors of the rooms (bill of exceptions, pp. 128-134). Strahl himself testified that he awoke at 3:30 A. M., but heard no noise whatever, though the fire department and police arrived before that hour (bill of exceptions, pp. 169-251-201). Simpson and O'Connor, a fireman and a policeman, both testified that there was lots of noise and confusion (bill of exceptions pp. 205-210-211). Wentzler testified he heard the gongs in the halls ring (bill of exceptions p. 363). Esther Bruhn occupied room 410, almost directly opposite Strahl's room, and she was awakened by a noise and cry of fire, and went down the stairway (bill of exceptions pp. 410-593-601). Golden occupied room 406, directly across from Strahl's room, and testified there was lots of noise on the fourth floor; that he was awakened by the noise and commotion; that the women screamed; that he dressed and went down the stairs to the office (bill of exceptions pp. 602-604-607-609). Pauly occupied room 437 on the same floor with Strahl, and was awakened by the noise
36 and went down the Douglas street fire escape (bill of exceptions pp. 616-617). Phelps occupied room 449 and was awakened by the noise and confusion and went down the alley fire escape (bill of exceptions pp. 621-622-624). Firemen and policemen were sent over the hotel to assist people in getting out (bill of exceptions p. 700). Strahl's own testimony shows that he had notice of the fire, arose, dressed leisurely, even putting on his gloves, went to the elevator and finding that it was not running and not knowing where the stairway was located, he went back to his room and used the rope fire escape (bill of exceptions pp. 169-250-251-252-

147-148-149-150-168-171-174-194-232-233-239-242-243-244-245-246-247-248-253-254). Failure on the part of Woltman to notify Strahl of the existence of the fire could not be the proximate cause of Strahl's injuries, for Strahl had ample notice of the fire. There was more noise and confusion than Woltman could have made by yelling fire or kicking on the doors. Had Strahl remained in his room he would have been uninjured.

(*f*) The statute as construed by the court is unconstitutional. The court by instruction No. 2 and likewise by instruction No. 10 told the jury that Woltman's duties required him to give warning of the fire to all guests, and that failure to do so constituted negligence, for which defendant was liable. In order to have notified Strahl of the fire Woltman would have been required to go to the door of Strahl's room, burst it open and awaken Strahl, and this would have compelled Woltman to risk his life for the purpose of saving Strahl. Had Woltman gone to Strahl's room he then would have been in as great danger as was Strahl, and both would have been compelled to make their escape. To enter a burning building, to pass through the halls, which were full of smoke involved a risk to Woltman. Laws can be passed which require precaution to be taken to guard against fire, but no law is constitutional which compels a man to risk his life in a fire for the purpose of saving
37 other people's lives. The statute as construed by the trial court is not only obnoxious to the state constitution, but also contravenes the 14th amendment to the federal constitution, to-wit, that portion of section 1 which provides that no state shall deprive any person of life, liberty or property without due process of law.

(*g*) By instruction No. 2, and likewise by instruction No. 11, the court told the jury that defendant owed the duty of doing all in his power to save the plaintiff, and failing to do so would be liable. These instructions made defendant an absolute insurer of plaintiff's safety against fire.

* * * * * * *

6. The court erred in giving to the jury instruction No. 5, given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

By this instruction the jury were told that defendant was liable for the neglect of all his servants and employees, and the jury were permitted to find in favor of plaintiff if the bellboy, night clerk, watchman, manager, engineer, day clerk or fireman failed in any respect to do everything in their respective power to save Strahl. The law imposed no duty upon defendant to have any employee around the hotel except the night watchman. Therefore, there was no duty placed upon defendant requiring that the other employees should assist in saving Strahl's life.

* * * * * * *

8. The court erred in giving to the jury instruction No. 6, given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

The defendant, Rome Miller, was not at the hotel the night of the fire. As a matter of fact he was then in California. By this instruction the jury were told that if the defendant knew, or by the exercise of reasonable diligence could have known of the existence of the fire in time to awaken plaintiff and permit him to
38 escape by the stairway or elevator and failed to do so, then defendant would be liable. Submitting such an issue to the jury when the evidence showed that defendant was not upon the premises was equivalent to saying that if any of defendant's employees could have discovered the fire and failed to do so and failed to notify plaintiff, defendant would be liable. This was equivalent to holding the defendant liable in the event any of the employees about the hotel might have discovered the fire and failed to do so. Defendant owed no duty to plaintiff to have any employee on duty that night excepting the night watchman.

* * * * * * *

10. The court erred in giving to the jury instruction No. 8, given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

This instruction once more submitted to the jury the issue as to the incompetency and negligence of Martin Woltman, the night watchman. It is erroneous on account of each and every one of the reasons and objections hereinbefore set forth, and urged as objections to instruction No. 2. It is especially erroneous in that it calls the attention of the jury a second time to the issues already submitted to them, and is a repetition of part of instruction No. 2.

* * * * * * *

12. The court erred in giving to the jury instruction No. 11, given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

By instruction No. 11 the court repeated to the jury the issues already submitted, and based upon the alleged failure to ring the gongs or to give plaintiff notice of the fire, and stated that failure in this respect on the part of defendant or its servants would make the defendant liable. Repeating these issues to the jury was in
39 and of itself error, but for the reasons hereinbefore set forth none of these issues should have been submitted to the jury.

* * * * * * *

13. The court erred in giving to the jury instruction No. 12, given by the court on its own motion, and to which ruling of the court defendant duly excepted at the time.

Under the instruction the jury were permitted to find that defendant was guilty of negligence in the event it failed to notify plaintiff of the existence of the fire by using the telephone. This was erroneous for the reason that the defendant owed no duty to notify plaintiff of the existence of the fire either by telephone or otherwise, and furthermore the evidence shows that all reasonable effort was made to notify all guests of the hotel by telephone. The evidence on this question is as follows:

Mr. Clark, the manager of the hotel, testified that at the time of the fire he was in his rooms on the second floor with his wife and two babies; that the first notice he had of the fire was about 3:20 A. M. when the bellboy called him over the telephone, and told him that the hotel was on fire; that he at once stepped out of his room into the hall, smelled smoke, went back into his room, roused his wife and children, put on his trousers, went down the stairway with his wife and children into the lobby of the hotel; that it took him only a minute to reach the office, and he noticed that it was then 3:23 A. M.; that when he reached the lobby the bellboy, Brotherington, was behind the counter at the telephone switchboard, ringing the rooms, and he, Clark, told the bellboy to plug in and ring as fast as he could, and notify the guests of the fire; that the bellboy was busy all the time notifying guests of the fire (bill of exceptions pp. 9-10-20-21-22-23-24-33-34-35-40-46-663-664-682). The bellboy himself (Roy Brotherington) testified that shortly after 3:00 o'clock he stepped into the drug store to buy a stamp; the night clerk at
40 the time being in the office (bill of exceptions pp. 305-306-331 and 334); that he was gone but five minutes and when he returned to the office the night clerk was upstairs looking in the dining room (bill of exceptions p. 306); that as he entered the office he heard the buzz of the telephone switchboard, answered the call which came in over the telephone line and was told the hotel was on fire (bill of exceptions p. 307); that he at once turned in the fire alarm on the A. D. T., turned on the switch to set the fire gongs in the hotel ringing, and that at the very same time the night clerk and the watchman came down the stairs from the dining room, asking, "Where is the fire alarm?" (bill of exceptions 307, 308, 327); that he at once called Mr. Clark, the manager, over the telephone, and Mr. Clark was the first person down stairs (bill of exceptions pp. 308, 322); that next he called Mr. Vail (bill of exceptions p. 308); that next he started ringing the phones in the rooms, ringing them as fast as possible, and when Mr. Clark arrived, he, the bellboy, was told to plug in and ring the rooms as fast as possible, and he did as he was told (bill of exceptions pp. 310, 312, 330); that he acted as fast as he could (bill of exceptions 328, 329). Finally a police officer took Brotherington away from the switchboard to the elevator and they attempted to run the elevator, but the smoke was so think in the shaft that the officer compelled Brotherington to run the elevator back down to the office floor and leave it alone (bill of exceptions pp. 316, 318, 319).

41 And afterwards, to-wit, on the 13th day of March, 1915, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1915, M'ch 13.

No. 18021.

EMIL J. STRAHL, Appellee,
v.
ROME MILLER, Appellant.

Appeal from the District Court of Douglas County.

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellant, taxed at $——. For all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. MORRISSEY,
Chief Justice.

42 And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

43 No. 18021.

STRAHL
v.
MILLER.

Opinion. Filed March 13, 1915.

1. An innkeeper is not an insurer of the safety of his guest but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured through the negligence of the innkeeper or his employees the innkeeper is liable therefor.
2. The act of 1883 (laws 1883, ch. 47) known as the "Nebraska Hotel Act" does not contravene the provisions of the fourteenth amendment to the Constitution of the United States or deprive an innkeeper of life, liberty or property without due process of law, and is a valid enactment.
3. This act confers upon a guest at a hotel the right to maintain a cause of action against the proprietor for injuries received through the negligence of the proprietor or his servants.
4. Instructions given by the court, when construed together, found to properly state the law applicable to the evidence.

44 MORRISSEY, *C. J.*:

Appellee Emil J. Strahl, January 22, 1911, became a guest at the Millard Hotel in Omaha, the hotel being owned by appellant Rome Miller. The building was five stories high and had more than fifty rooms, and was not of fire proof construction. Appellee was assigned to room 404, which was on the fourth floor of said hotel, and retired about 10:30 P. M. During the night a fire occurred in the hotel, and appellee undertook to escape by means of a rope fire escape and in doing so suffered bodily injuries. He brought this suit in the district court for Douglas county against the proprietor of the hotel, alleging that while he was a guest at said hotel a fire broke out therein and that by reason of the negligence of defendant and his employees it was not properly discovered or controlled and that a portion of the hotel was burned; that the halls were filled with smoke and gases endangering the lives of the guests and inmates; that appellant and his employees failed and neglected to awaken or give notice to the appellee of the existence of the fire; that appellant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests and that the employees of the appellant neglected and carelessly failed to be at their posts of duty, etc.; that the appellant was guilty of negligence in that he did not maintain an efficient or sufficient system of fire gongs for
45 arousing guests in case of fire and that he did not, as soon as the fire was discovered, ring or cause to be rung the fire gong on the floor on which appellee was sleeping, nor did he ring or cause to be rung a telephone in the room occupied by appellee or in any way awaken or arouse appellee to notify him of the existence of the fire, nor did he give or cause to be given to appellee information as to the location of the stairways leading from the fourth floor, and that the hotel was not equipped with a sufficient number of stairways, and that appellant was negligent in failing to operate the elevator leading to and from the fourth floor and in refusing to respond to plaintiff's demand to be removed from said floor and in failing to have any light, sign or notice indicating the location of the elevator; that appellee's room was equipped with a rope fire escape which appellant represented could be used in escaping from said room in case of fire and that said fire escape was too small and was insufficient for this purpose and that appellant negligently failed to give appellee proper directions for the use of said rope fire escape; that by reason of the said negligence of appellant he has been damaged in the sum of $15,000.

The answer denies all the averments of negligence contained in the petition and contains an affirmative defense of contributory negligence.

There was a trial to a jury and a verdict of $6,500 for appellee, and appellant brings the cause here for review.

The evidence discloses that appellee went to his room on the

fourth floor of the hotel about 10:30 P. M.; that he awoke
46 about 3:30 A. M., and above five minutes thereafter he detected the odor of smoke; that he arose and turned on the electric light, opened the door and took down the telephone receiver and asked the office where the fire was, but received no response; he then dressed and went to the elevator shaft, feeling his way along the walls; that the smoke was so thick he could not see the light in the hall; that when he reached the elevator it was not running, but he heard someone holler "take the stairway;" that he did not know the location of the stairway and returned to his room; tried to telephone the office but received no response, untangled the rope fire escape, threw it out of the window and tried to go down hand over hand. He testified that he had looked over this fire escape the evening before and commented to himself "well, in case of fire a fellow would have a fat chance of getting down on that rope, it is so thin;" that it was equipped with a metal piece to regulate the speed of descent, but that this metal piece would not work, and that he slid down the rope finally landing on a platform below and sustained the injuries of which he complains.

His wife and son testified that they visited the room the next morning, and that the rope was very thin. They describe it as being like "a window cord" and the son claims to have thrown the rope out of the window and that it did not reach within several feet of the platform below on which the appellee fell. Appellant offered in evi-
dence a five-eighths inch hemp rope fire escape equipped with
47 a patented metallic appliance to facilitate its use, the rope being of sufficient length to reach from appellee's room to the landing below. Appellee denies that this is the rope fire escape which was in his room the night of the fire and on this question there is a direct conflict of the evidence.

It is undisputed that the smell of smoke was detected by one of the employees in the hotel about 1:30 A. M., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter might be burning there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts together with the testimony relating to the fire gongs, fire escape and the general conduct of appellant's agents were all properly submitted to the jury.

Exceptions are taken to the instructions of the court, and it is insisted by appellant that no common law liability rests upon an innkeeper to protect his guests from injury by fire, and that the act of 1883 relating to innkeepers contravenes both the state and federal constitutions, in that it deprives the innkeeper of life, liberty and property without due process of law. These points we do not think are well taken. The weight of authority upholds the doctrine of a common law liability. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power
so to do. Clancy v. Barker, 71 Neb. 83. Section 3104, Rev.
48 St. 1913, the act complained of, reads as follows: "In hotels or lodging houses containing more than fifty rooms, and being

four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates." This is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest. While an innkeeper is not an insurer of the safety of his guest, yet he may not omit to do the things that are reasonably necessary for his safety and protection. 11 Am. & Eng. Ency. Law (1st ed.) 32. The law seems to be well settled that when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that
49 the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide. "The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect evidence of its violation as going to show negligence." 21 Am. & Eng. Ency. Law (2d ed.) 483, and cases cited. Wolf v. Smith, 149 Ala. 457, 9 L. R. A. n. s. 338.

Exceptions were taken to the instructions given by the court, but the instructions appear to be based upon the evidence and, taken as a whole, no prejudicial error is disclosed.

The question of contributory negligence was properly submitted. The jury were told that if "failure of the said plaintiff to exercise the care that a man of ordinary prudence would have exercised in the circumstances was the proximate cause of the alleged injury, then the defendant is not liable * * * even though you might also find that the defendant was negligent in not discovering the fire earlier or in not notifying the plaintiff promptly of its existence."

No complaint is made of the amount of recovery. The issues appear to have been properly submitted to the jury, and the judgment is

Affirmed.

Fawcett and Hamer, JJ., not sitting.

50 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, are a true and complete transcript of that portion of the record and proceedings in the case of Emil J. Strahl, appellee, v. Rome Miller, appellant, No. 18021, requested to be prepared for the supreme court of the United States by the præcipe filed in said case in this court on April 21, 1915, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the City of Lincoln, this 27th day of April, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

51 In the Supreme Court of the State of Nebraska.

In the Supreme Court of the United States.

No. 18021.

EMIL J. STRAHL, Appellee and Defendant in Error,
vs.
ROME MILLER, Appellant and Plaintiff in Error.

Assignments of Error.

Comes now Rome Miller, appellant in the above named case in the Supreme Court of the State of Nebraska, and plaintiff in error in the Supreme Court of the United States, and complaining of Emil J. Strahl, appellee in the Supreme Court of the State of Nebraska, and defendant in error in the Supreme Court of the United States, makes the following assignment of errors:—

1. The District Court of Douglas County, Nebraska, erred when it instructed the jury that under the law (Statute of 1883—Revised Statutes of Nebraska 1913, Secs. 3104, 3105, 3106, 3107, 3108) it was the duty of Rome Miller to maintain at his hotel at least one competent watchman, whose duty it was to keep watch and guard in such hotel against fire and to give warning in case a fire should break out, to all guests and other persons therein; and, further, that a large alarm bell or gong should be placed on each floor or story, to be used to alarm the inmates in case of fire; and to do all in their power to save guests and inmates.

2. The District Court of Douglas County, Nebraska, erred when it instructed the jury that failure to perform a legal duty, such as stated in the court's instruction, constitutes negligence.

3. The District Court of Douglas County erred when it instructed

the jury that under the law (Statute of 1883—Revised Statutes of Nebraska 1913, Secs. 3104, 3105, 3106, 3107, 3108) Rome Miller knew, or by the exercise of reasonable diligence could have
52 known, of the existence of the fire in the building in time to have awakened the plaintiff and rescued him from his position of danger by enabling him to descend to the lower part of the building by using the stairs or elevator or other usual method, and that said Rome Miller failed to so awaken or notify said plaintiff, that said Rome Miller would be liable in damages.

4. The District Court of Douglas County, Nebraska, erred when it instructed the jury that under the law (Statute of 1883—Revised Statutes of Nebraska 1913, Secs. 3104, 3105, 3106, 3107, 3108) it was the duty of Rome Miller to have and keep in the Millard Hotel on the night of the fire at least one competent watchman, whose duty it was to keep watch and guard in such hotel against fire, and if reasonably in his power under the evidence and circumstances shown by the evidence to give warning of the fire in said hotel, and as soon as was reasonably possible awaken Emil J. Strahl and inform him of such fire, and that if the watchman failed to do so, the said Rome Miller would be liable to the said Emil J. Strahl.

5. The District Court of Douglas County, Nebraska, erred when it instructed the jury that it was the duty of Rome Miller to give reasonable notice of the fire to Emil J. Strahl as soon as it was reasonably in his power to do so, and do all reasonably in his power to save the plaintiff from injury by reason of such fire, and it was the duty of the said Rome Miller to use reasonable care for the safety of Emil J. Strahl, and that in failing to perform such duty, either in person or by his servents or agents, the jury should find for Emil J. Strahl and against the defendant, Rome Miller.

6. The District Court of Douglas County, Nebraska, erred when it instructed the jury that under the law (Statute of 1883—Revised Statutes of Nebraska, 1913, Secs. 3104, 3105, 3106, 3107, 3108) it was the duty of Rome Miller to give notice or warning to the plaintiff of the existence of the fire as soon after its discovery as reasonable as possible in the circumstances, and to use all reasonable means at his command to this end.

7. The instructions given to the jury by the District Court of Douglas County, Nebraska, placed upon the statute of 1883, Revised Statutes of Nebraska 1913, sections 3104 to 3108 inclusive,
53 an interpretation which makes said statutes unconstitutional under the 14th amendment to the constitution of the United States, in that such interpretation deprived Rome Miller of his liberty and his property without due process of law.

8. The Supreme Court of the State of Nebraska erred in affirming the decision and judgment rendered by the District Court of Douglas County against Rome Miller and in favor of Emil J. Strahl.

9. The Supreme Court of the State of Nebraska erred in holding that the statute of 1883, Revised Statutes of Nebraska, 1913, sections 3104 to 3108 inclusive, is constitutional, and does not violate the 14th amendment to the constitution of the United States in that it

deprived Rome Miller of life, liberty and property without due process of law, said statutes being in words and figures as follows:—

SEC. 3104. When Must Employ Watchman—Awaken Guests. In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates.

SEC. 3105. Same—Penalty. Every proprietor of such hotel or lodging house who shall fail to comply with the requirements of the next preceding section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars.

SEC. 3106. Watchman Guilty of Misdemeanor. Should such watchman leave his post of duty in such hotel or lodging house for more than fifteen minutes at any one time during the hours specified for him to be on watch, or if he shall sleep while on duty, or if he shall fail to awaken the persons sleeping in such hotel or lodging house, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars nor more than five hundred dollars.

SEC. 3107. When Two Stairways are Required. All hotels or lodging houses over two stories in height and over one hundred feet in length shall be constructed so that there shall be at least two stairways for the use of the guests leading from the ground floor to the uppermost story. And all outer doors shall be so hung that they shall open on the outside instead of the inside of such hotel.

SEC. 3108. Grand Jury. The four next preceding sections shall be given in charge to the grand jury at each session. And they shall make due inquiry and indict and bring to trial all parties found guilty of violating any of its provisions.

54 10. The Supreme Court of the State of Nebraska erred in refusing to reverse the judgment and decision rendered by the District Court of Douglas County, Nebraska, in favor of Emil J. Strahl and against Rome Miller, said judgment being for the sum of $6,500.00 interest and costs of suit.

11. The Supreme Court of the State of Nebraska erred in failing to hold that the interpretation given to the Act of 1883, Revised Statutes of 1913, sections 3104 to 3108 inclusive, and above specifically set forth, violated the provisions of the 14th amendment to the constitution of the United States which provides, among other

things, that "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

12. The decision of the Supreme Court of the State of Nebraska and opinion of that court is erroneous in that part thereof where it holds that the aforesaid Act of 1883, being Revised Statutes of Nebraska for 1913, sections 3104 to 3108 inclusive, is constitutional, and in its application by the District Court of Douglas County, Nebraska, at the trial of the above entitled cause, did not deprive Rome Miller of his life, liberty and property without due process of law, contrary to the provisions of the constitution of the United States.

13. The Supreme Court of the State of Nebraska erred in affirming the judgment for $6,500.00, interest and costs rendered by the District Court of Douglas County, Nebraska, in favor of Emil J. Strahl and against Rome Miller, and which said judgment was entered in said District Court of Douglas County, Nebraska, on the 24th day of December, 1912.

14. The aforesaid judgment rendered against Rome Miller by the District Court of Douglas County, Nebraska, and affirmed by the Supreme Court of the State of Nebraska, if not reversed, will operate to deprive the said Rome Miller of life, liberty and property without due process of law, all contrary to the provisions of the 14th amendment to the constitution of the United States above referred to.

EDGAR M. MORSMAN, JR.,
Attorney for Rome Miller, Plaintiff in Error in the Supreme Court of the U. S., and Appellant in the Supreme Court of the State of Nebraska.

55 [Endorsed:] No. 18021. In the Supreme Court of the State of Nebraska. Emil J. Strahl, Appellee, vs. Rome Miller, Appellant. Assignments of Error. Supreme Court of Nebraska. Filed Apr. 15 1915. H. C. Lindsay, Clerk.

56 In the Supreme Court of the State of Nebraska.

No. 18021.

EMIL J. STRAHL, Appellee,
vs.
ROME MILLER, Appellant.

In the Supreme Court of the United States.

ROME MILLER, Plaintiff in Error,
vs.
EMIL J. STRAHL, Defendant in Error.

Prayer for Reversal.

Comes now Rome Miller, plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of Nebraska in a

case pending before said tribunal, wherein Emil J. Strahl was appellee and Rome Miller, was appellant, and which said judgment of the Supreme Court of the State of Nebraska affirmed and made final a judgment entered by the District Court of the County of Douglas, State of Nebraska, for $6,500.00, interests and costs entered on the 24th day of December, 1912 in favor of Emil J. Strahl as plaintiff and against Rome Miller as defendant. And said Rome Miller, plaintiff in error, further prays that the aforesaid judgment rendered in the District Court of the State of Nebraska, within and for Douglas County, Nebraska, be likewise reversed and set aside.

EDGAR M. MORSMAN, JR.,
Attorney for Rome Miller, Plaintiff in Error.

57 [Endorsed:] 18021. In the Supreme Court of the State of Nebraska. Emil J. Strahl, Appellee, vs. Rome Miller, Appellant. In the Supreme Court of the United States. Rome Miller, Plaintiff in Error, vs. Emil J. Strahl, Defendant in Error. Prayer for Reversal. Supreme Court of Nebraska. Filed Apr. 20, 1915. H. C. Lindsay, Clerk.

58 In the Supreme Court of the State of Nebraska.

No. 18021.

EMIL J. STRAHL, Appellee and Defendant in Error,
vs.
ROME MILLER, Appellant and Plaintiff in Error.

Petition for Writ of Error to the Supreme Court of the State of Nebraska.

To the Hon. A. M. Morrissey, Chief Justice:

The petition of Rome Miller, appellant in the above entitled cause, who resides in the City of Omaha, County of Douglas, and State of Nebraska, respectfully shows:

1. That theretofore on or about the 14th day of December, 1910, Emil J. Strahl filed in the District Court of the State of Nebraska, within and for the County of Douglas, his amended petition against your petitioner herein. It was alleged, among other things, that your petitioner was the owner and proprietor of the Millard Hotel, located at the corner of Douglas and 13th Streets in the city of Omaha; that the said Emil J. Strahl was a guest at said hotel on the evening of January 22nd and morning of January 23, 1911; that said hotel had more than fifty rooms, was more than four stories high, and that said Emil J. Strahl occupied a room on the fourth floor of said hotel; that a fire broke out in said hotel on the morning of January 23, 1911, and the said Emil J. Strahl was injured in attempting to escape therefrom, and that said injuries were due to the negligence of your petitioner in failing to discover and controlling said fire; in failing to notify the said Strahl of said fire; in failing to

do all in the power of your petitioner to save the said Strahl from said fire. Said petition further alleged that your petitioner failed to have a competent night watchman at said hotel; that the fire was
59 not properly controlled and extinguished, because your petitioner had failed to leave proper instructions with the employees in said hotel; that your petitioner failed to awaken the said Strahl and notify him of the said fire in time to permit of his escape from said hotel; that the night watchman failed to notify the said Strahl of said fire; that the said Strahl in attempting to escape from said hotel during said fire broke his ankle and suffered damage in the sum of $15,000.00, for which said sum the said Strahl prayed judgment against your petitioner.

2. That in answer to the petition above mentioned, filed in said District Court of Douglas County, your petitioner filed an amended answer on the 4th day of November, 1912; that subsequently the said Emil J. Strahl on November 8, 1912, filed a reply to the answer of your petitioner, and said cause was tried to a jury, and on November 12, 1912, the said jury returned a verdict in favor of Emil J. Strahl and against your petitioner in the sum of $6,500.00.

3. That said cause was submitted to the jury upon instructions by the court upon several issues, among which were the following:

(*a*) The court instructed the jury that the statutes of the state of Nebraska required your petitioner to keep at said hotel at least one competent watchman whose duty it should be to keep watch and guard in said hotel against fire, and to give warning in case a fire should break out, to all guests and other persons in said hotel, and that your petitioner would be liable for failure of said watchman to perform said duty.

(*b*) The court further instructed the jury that the statute of the State of Nebraska placed a duty upon your petitioner in the event a fire breaking out in said hotel to do all in his power to save the guests and inmates thereof, and that failing to do so your petitioner would be liable.

(*c*) The court further instructed the jury that your petitioner was liable for the failure of the employees in said hotel to do all in their power to save the guests and inmates thereof.

(*d*) The court further instructed the jury that if your petitioner could have known of the existence of the fire in time to have awakened the said Strahl and to have rescued him from his posi-
60 tion of danger, and that your petitioner failed to awaken the said Strahl or notify him of said fire, that your petitioner would be liable in damages to the said Strahl.

4. That afterwards your petitioner filed in the aforesaid District Court of Douglas County a motion for a new trial, which being overruled and judgment entered upon the aforesaid verdict, your petitioner duly perfected his appeal to the Supreme Court of the State of Nebraska.

5. That on his appeal to the Supreme Court of the State of Nebraska, your petitioner contended that the District Court of Douglas County erred in the trial of said cause, and that the decision of said District Court of Douglas County should be reversed by the Supreme

Court of the State of Nebraska, and a new trial be granted to your petitioner on account of many errors and for many reasons, among which were the following, to-wit:

The District Sourt of Douglas County had submitted the case to the jury upon the theory that the statute of the state of Nebraska, passed in 1883, and found as sections 3104 to 3107 inclusive, of the Revised Statutes of Nebraska for 1913, was a valid statute, placing upon your petitioner certain duties, the violation or failure to perform which, on the part of your petitioner or on the part of the watchman or other employees hired by your petitioner, would give to the aforesaid Emil J. Strahl a cause of action for damages. Whereas your petitioner contended that the aforesaid statute of the state of Nebraska was unconstitutional, and that said statute as interpreted by the trial court violates the provisions of the 14th amendment to the Constitution of the United States in that it deprived your petitioner of life, liberty and property without due process of law.

That on the 13th day of March, A. D. 1915, the Supreme Court of Nebraska, handed down its opinion and decision in the above entitled cause wherein it affirmed the decision of the District Court of Douglas County, Nebraska and refused to grant to your petitioner a new trial or to reverse the decision of said District Court of Douglas County, and held that the aforesaid statute of the state of Nebraska was constitutional and did not violate the 14th amendment to the Constitution of the United States, nor deprive your petitioner of life, liberty and property without due process of law.

61 Wherefore your petitioner prays that a writ of error may issue, and that he may be allowed to bring up for review before the Supreme Court of the United States the order and judgment of the Supreme Court of the State of Nebraska, entered on the 13th day of March A. D. 1915, wherein the Supreme Court of the State of Nebraska affirmed the decision of the District Court of Douglas County, Nebraska, as aforesaid, and refused to grant to your petitioner a new trial, and that your petitioner may have such other and further relief in the premises as may be just and proper, and your petitioner herewith presents his assignments of error which more specifically set forth his reasons why said judgment of the Supreme Court of the State of Nebraska is erroneous and violates the constitutional rights of your petitioner, and your petitioner further prays that a transcript of the record, proceedings and papers upon which said judgment of the Supreme Court of the State of Nebraska, duly authenticated, may be sent to the Supreme Court of the United States.

EDGAR M. MORSMAN, JR.,
Attorney for Rome Miller.

62 [Endorsed:] No. 18021. In the Supreme Court of the State of Nebraska. Emil J. Strahl vs. Rome Miller. Petition for writ of error to the Supreme Court of the State of Nebraska. Supreme Court of Nebraska. Filed Apr. 15, 1915. H. C. Lindsay, Clerk.

63 In the Supreme Court of the State of Nebraska.

In the Supreme Court of the United States.

EMIL J. STRAHL, Appellee and Defendant in Error,
vs.
ROME MILLER, Appellant and Plaintiff in Error.

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska.

And now, to-wit, on this 15th day of April, 1915, this matter being presented to the undersigned, Chief Justice of the Supreme Court of the State of Nebraska, upon the application of Rome Miller as plaintiff in error, against Emil J. Strahl as defendant in error, for allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska, to review a certain judgment entered by the Supreme Court of the State of Nebraska on the 13th day of March, A. D. 1915, whereby the said Supreme Court of the State of Nebraska affirmed a judgment of $6,500.00, interest and costs, rendered against the said Rome Miller and in favor of the said Emil J. Strahl, by the District Court of Douglas County, Nebraska, and the petition of the said Rome Miller, plaintiff in error, being accompanied by assignments of error duly made and filed, it is now ordered that the writ of error as prayed for be allowed, and the Clerk of the Supreme Court of the United States, or the Clerk of the United States District Court for the District of Nebraska, Lincoln Division, be and they are hereby instructed to issue said writ upon the request of said Rome Miller, plaintiff in error, and the said Rome Miller, plaintiff in error, is hereby granted leave to bring up for review before the Supreme Court of the United States the order and judgment of the Supreme Court of the State of Nebraska, entered as aforesaid on the 13th day of March,
64 A. D. 1915, and which said order affirmed and made final a judgment rendered in the District Court of Douglas County, Nebraska, in favor of Emil J. Strahl and against Rome Miller, for the sum of $6,500.00, interest and costs, and supersedeas bond is hereby fixed in the sum of $10,000.

It is further ordered that citation be issued and served upon Emil J. Strahl, defendant in error, as required by law.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

65 [Endorsed:] No. 18021. In the Supreme Court of the State of Nebraska. In the Supreme Court of the United States. Emil J. Strahl, Appellee and Defendant in error, vs. Rome Miller, Appellant and Plaintiff in error. Order allowing writ of error from the Supreme Court of the United States to the Supreme Court of the State of Nebraska. Supreme Court of Nebraska. Filed Apr. 15, 1915. H. C. Lindsay, clerk.

66 In the Supreme Court of the United States.

ROME MILLER, Plaintiff in Error,
vs.
EMIL J. STRAHL, Defendant in Error.

Supersedeas Bond.

Know all Men by these Presents:

That the undersigned, Rome Miller, as principal, and The Fidelity & Casualty Co. of New York as surety, are held and firmly bound unto the above named Emil J. Strahl, his heirs or assigns, in the penal sum of $10,000.00 and for the payment of which said sum well and truly to be made, we hereby bind ourselves and each of us, our, and each of our heirs, executors, administrators, jointly and severally by these presents.

Signed this 15th day of April, A. D. 1915.

The condition of the foregoing bond is such that whereas the above named Rome Miller has sued out a writ of error in the Supreme Court of the United States, and directed to the Supreme Court of the State of Nebraska, for the purpose of reviewing a judgment rendered by the Supreme Court of the State of Nebraska on the 13th day of March, A. D. 1915, and which said judgment of the Supreme Court of Nebraska affirmed and made final a judgment rendered by the District Court of Douglas County, Nebraska, wherein Emil J. Strahl was plaintiff and Rome Miller was defendant.

Now, therefore, if the above named Rome Miller shall prosecute said writ of error to effect and well and truly pay all damages and costs in the event the aforesaid judgment rendered by the Supreme Court of the State of Nebraska shall be affirmed, then this obligation to be null and void, otherwise to remain in full force and effect.

67 ROME MILLER,
By EDGAR M. MORSMAN, JR., *His Att'y.*
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By HARRY S. BYRNE, *Attorney in Fact.*
[SEAL.]

The foregoing bond and surety approved by me this 15th day of April, A. D. 1915.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 18021. In the Supreme Court of the United States. Rome Miller, Plaintiff in Error, vs. Emil J. Strahl, Defendant in Error. Supersedeas Bond. Supreme Court of Nebraska. Filed Apr. 15, 1915. H. C. Lindsay, Clerk.

68 In the Supreme Court of the United States.

ROME MILLER, Plaintiff in Error,

vs.

EMIL J. STRAHL, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest court of law of the said State, in which a decision could be had in the said suit between Rome Miller, plaintiff in error, and Emil J. Strahl, defendant in error (said Rome Miller being appellant in the Supreme Court of the State of Nebraska and defendant in the District Court of Douglas County, Nebraska; and the said Emil J. Strahl being appellee in the Supreme Court of the State of Nebraska and plaintiff in the District Court of Douglas County, Nebraska) wherein was drawn in question the validity of a statute of the State of Nebraska on the ground of the same being repugnant to the Constitution of the United States and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said Rome Miller, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties
69 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 15th day of [March]* next in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

May

Witness the Honorable Edward D. White, Chief Justice of said

[* Word enclosed in brackets erased in copy.]

Supreme Court the 16th day of April, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,
Clerk of the United States District Court within and for the District of Nebraska, Lincoln Division.

Allowed by

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Change from March to May in date for return of writ agreed to by appellee.

H. C. BROWN,
Attorney for Appellee.

70 [Endorsed:] 18021. In the Supreme Court of the United States. Rome Miller, plaintiff in error, vs. Emil J. Strahl, defendant in error. Writ of error. Supreme Court of Nebraska. Filed Apr. 20, 1915. H. C. Lindsay, clerk.

71 SUPREME COURT,
State of Nebraska, ss:

I, H. C. Lindsay, clerk of said court, do hereby certify that there was lodged with me as such clerk on April 15, 1915, in the case of Emil J. Strahl, appellee, v. Rome Miller, appellant, No. 18021:

1. The original bond of which a copy is herein set forth.
2. One copy of writ of error, as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the City of Lincoln, this 27th day of April, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.
By VICTOR SEYMOUR, *Deputy.*

72 In the Supreme Court of the United States.

ROME MILLER, Plaintiff in Error,
vs.
EMIL J. STRAHL, Defendant in Error.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Emil J. Strahl, Greetings:

You are hereby cited and admonished to be and to appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, wherein Rome Miller is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska, this 15th day of April, in the year of our Lord, one thousand nine hundred and fifteen.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Service of the within Citation accepted this 16th day April 1915.

EMIL J. STRAHL,
Defendant in Error,
By H. C. BROWN,
MOORE & DANIELS,
Attorneys for Def't in Error.

Supreme Court of Nebraska. Filed Apr. 19, 1915. H. C. Lindsay, clerk.

73 [Endorsed:] In the Supreme Court of the United States. 18021. Rome Miller, plaintiff in error, vs. Emil J. Strahl, Defendant in error. Citation of writ of error. Supreme Court of Nebraska. Filed Apr. 19, 1915. H. C. Lindsay, clerk.

74 In the Supreme Court of the United States.

ROME MILLER, Plaintiff in Error,
vs.
EMIL J. STRAHL, Defendant in Error.

Præcipe.

To H. C. Lindsay, Clerk:

In compliance with the Writ of Error served upon you, please prepare at your earliest convenience duly certified record to be docketed in the Supreme Court of the United States; same to contain the following:

(1) Amended petition filed in District Court, Douglas County.
(2) Amended answer filed in District Court, Douglas County.
(3) Reply to amended answer.
(4) Instructions of Court.
(5) Verdict.
(6) Judgment.
(7) Paragraph numbered (1) of Rule 12 of Supreme Court of Nebraska Rules.
(8) The following portions of appellant's brief.
(*a*) Assignments of Error No. 3 (commencing about middle of page 23 and continuing to and through page 28); also No. 6 found on page 29; also No. 8 on page 30; also No. 10 found on page 32; also No. 12 found on page 33; also No. 13 found on page 33 and 34.
(9) Opinion of the Supreme Court of the State of Nebraska.
(10) Petition for Writ of Error.
(11) Assignments of Error.
(12) Order allowing Writ of Error.
(13) Bond.
(14) Citation and Service.
75 (15) Prayer for reversal.
(16) This præcipe.
(17) Writ of Error.

EDGAR M. MORSMAN, JR.,
Attorney for Plaintiff in Error.

Due legal service of the foregoing præcipe is hereby acknowledged this 20th day of April, 1915.

H. C. BROWN,
Attorney for Emil J. Strahl,
Defendant in Error.

76 [Endorsed:] In the Supreme Court of the United States. 18021. Rome Miller, plaintiff in error, vs. Emil J. Strahl, defendant in error. Præcipe & proof of service. Supreme Court of Nebraska. Filed Apr. 21, 1915. H. C. Lindsay, clerk.

77 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of that portion of the record and proceedings in the within entitled case requested to be prepared by the præcipe filed in my office on April 21, 1915, together with all things concerning the same.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court of Nebraska, in the City of Lincoln, this 27th day of April, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska,..
By VICTOR SEYMOUR,
Deputy.

Costs of Transcript $21.00.

78 *Point Two. The Act of* 1883 *as Interpreted by the Trial Court is Unconstitutional.*

(*a*) The statute requires the proprietor to do all in his power to save the guests and requires the watchman to awaken and notify each guest of the fire, and failure of proprietor or the watchman to perform this duty makes the defendant liable in damages under the instructions of the court. The watchman could awaken Strahl only by going to his room and this would place the watchman in as much danger as Strahl himself was in. To do everything in his power to save the guests would require the proprietor to risk his own life. The court placed no restrictions upon this alleged duty of the proprietor and the watchman. The police power of the state can be exercised for the health and protection of the inhabitants, but it can not require any person to run the risk of receiving bodily injury and possibly death. To compel the defendant, the watchman and the other employees to run the risk of bodily injuries and failing to do so to make the proprietor liable in damages is not a proper exercise of the police power, but constitutes a taking of property without due process of law. The statute contravenes both the state and federal constitutions.

To require the inn-keeper and his employees to do all in their power to save the guests requires the inn-keeper and his employees to risk their own lives and therefore deprives the inn-keeper of life, liberty, and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

In so far as the statute attempts to impose upon the inn-keeper the duty of doing all in his power to save his guests, it is too indefinite and therefore void. By what standard is the conduct of the

proprietor to be judged? Undoubtedly each employee
79 thought he was doing all he could to save the guests and each guest thought something additional might have been done. Which is correct, employee or guest? Failure to comply with the statute is a misdemeanor, a crime, but a statute fixing or defining a crime must be definite and certain. The provision requiring the inn-keeper to do all in his power to save the guests is too indefinite and uncertain to impose any duty upon the defendant.

State vs. Mann, 2 Ore. 238.
Cook vs. State, 26 Ind. App. 278.
U. S. vs. Capital Traction Co., 34 App. D. C. 592.
Brown vs. State 137 Wis. 543, 119 N. W. 338.
Tozu vs. U. S., 52 Fed. 917.
R. R. Com. vs. Grand Trunk, 100 N. E. 852.
U. S. vs. Reese, 92 U. S. 214.
American School, etc., vs. McAnnulty, 187 U. S. 94.
Czana vs. Board of Medical Sup., 25 App. D. C. 443.

80 STATE OF NEBRASKA,
Supreme Court, ss:

I, H. C. Lindsay, clerk of the Supreme Court of the state of Nebraska, do hereby certify that I have compared the foregoing copy of "Point Two" in appellant's brief filed in this court on April 11, 1914, in the case of Emil J. Strahl, appellee, v. Rome Miller, appellant, No. 18021, with the original now on file in my office and that the same is a true and correct copy of said portion of appellant's brief.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court at the city of Lincoln, Nebraska, this 29th day of April, 1915.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY, *Clerk,*
By VICTOR SEYMOUR,
Deputy.

Endorsed on cover: File No. 24,715. Nebraska Supreme Court. Term No. 971. Rome Miller, plaintiff in error, vs. Emil J. Strahl. Filed May 10th, 1915. File No. 24,715.

13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 458

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

MOTION TO AFFIRM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

H. C. Brome,
Clinton Brome,
H. S. Daniel,
Attorneys for Defendant in Error.

ELBOD BROS., OMAHA

MOTION TO AFFIRM.

Comes now the defendant in error in the above entitled cause and shows to the court here that plaintiff in error has applied for and obtained a writ of error to the Supreme Court of the State of Nebraska in the above entitled cause, to review a judgment of said Supreme Court of the State of Nebraska, duly entered on the 13th day of March, 1915, affirming a judgment in favor of this defendant in error, and against the plaintiff in error, rendered by the District Court of Douglas County in the State of Nebraska, in an action brought by defendant in error in the said District Court to recover damages for injuries sustained by defendant in error by reason of a fire occurring in a hotel in the City of Omaha, owned and operated by plaintiff in error while defendant in error was a guest therein. The only federal question involved in the case is the constitutionality of a law enacted by the Legislature of Nebraska in 1883, known as the "Nebraska Hotel Act." For the reason that it is manifest that the writ of error was taken for delay only and that the question on which the decision of the cause in this court depends is so frivolous as not to need further argument, defendant in error moves the court here that the judgment of the Supreme Court of the State of Nebraska be affirmed.

H. S. Brome

Clinton Brome

Attorneys for Defendant in Error

IN THE

SUPREME COURT OF THE UNITED STATES

TRANSCRIPT OF RECORD FOR PURPOSE OF MOTION TO AFFIRM.

October Term, 1914.

No. .....

ROME MILLER,
Plaintiff in Error.

vs.

EMIL J. STRAHL,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

AMENDED PETITION.

In the District Court of Douglas County, Nebraska. Doc. 114, No. 99.

Emil J. Strahl, Plaintiff, vs. Rome Miller, Defendant.

Plaintiff above named for his Amended Petition and cause of action against defendant above named, alleges:

1st: That heretofore at the times hereinafter mentioned defendant was the owner and proprietor, keeper and operator of a hotel building and hotel known as the Millard Hotel located at 13th and Douglas Streets in the City of Omaha, Nebraska, and the said defendant had full charge and control of said hotel and building and operated the same as an Inn for the accommodation of guests and for furnishing such guests with sleeping apartments for compensa-

tion, and the defendant carried on thereat, as an innkeeper, a general hotel business.

2nd. That defendant as such innkeeper received and entertained the plaintiff at said hotel as a guest for hire and while plaintiff was such guest, to-wit: on the night of January 22, 1911, up to and on and during the morning of January 23, 1911, he occupied as such guest a room on the 4th floor of said hotel. That said hotel at such time had more than 50 rooms and was four and more stories high.

3rd. That on the morning of said January 23rd between midnight and dawn and before six o'clock A. M. and while plaintiff was occupying said room as aforesaid, a hostile fire started and broke out in said hotel on one of the lower floors thereof and the same, by reason of the hereinafter stated negligence of defendant, was not promptly discovered, located or controlled, and a portion of the hotel was burned and large quantities of smoke and gases therefrom filled the rooms and halls and endangered the inmates. That defendant and each and all of his employes and servants in that behalf negligently failed to awaken or give plaintiff notice of said fire or to do all in their power to save plaintiff, and thereby and by reason of the hereinafter stated negligence of the defendant, the plaintiff was then and there injured and damaged as hereinafter stated, by said smoke and gases and in attempting to escape from said hotel in order to avoid said danger.

4th. That said fire, as aforesaid, broke out and was not discovered, located or controlled by defendant or his servants in that behalf, by reason of the carelessness and negligence of the defendant in not providing or maintaining a competent night watchman or an adequate watch service, and in not properly patrolling, examining or inspecting said hotel or searching for fire for the purpose of guarding against fire and safeguarding the guests, and by reason of the fact that the employees of the defendant in that behalf negligently and carelessly failed to be at their posts of duty and negligently and carelessly failed to

promptly respond or act upon warnings given them and defendant of the existence of said fire. That defendant was further negligent and careless by reason of the failure of the defendant and his servants in that behalf, to promptly do anything to arrest the progress and volume of said fire, smoke and gases and by reason of the negligence and carelessness of the defendant in failing to give his said employees instructions or directions to be observed in guarding against fire or in protecting the guests from danger by fire.

5th. That defendant was further guilty of negligence and carelessness in the premises in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire and that he did not promptly, as soon as the fire was discovered, or at all, ring or cause to be rung, a fire gong on said 4th floor, or ring or cause to be rung a telephone in the room occupied by plaintiff and in that he, nor his night watchman, nor any of his servants, did not awaken or rouse plaintiff or notify him of said fire, nor did any of them do all in their power, or anything to awaken or save plaintiff.

6th. That there was a telephone in the room occupied by said plaintiff connecting his room with the office of the said hotel and the said defendant and his employees carelessly and negligently failed to make use of the said telephone for calling or arousing plaintiff and in this connection plaintiff alleges that the defendant and his employees were careless and negligent in that they did not keep an employee in the office of said hotel prior to and during the time of said fire for the purpose of safeguarding and protecting the guests and defendant and his employees were careless and negligent in that prior to and at the time of the said fire there was no employee of the said hotel in the office thereof to receive warnings of the said fire and to promptly convey warnings to the guests and to arouse and otherwise attend to the safety of said guests, that the defendant was guilty of carelessness and neg-

ligence in that he did not maintain a sufficient force of employees on the premises at the time of said fire or theretofore, to properly protect the guests of said hotel against danger from fire.

7th. That the defendant was further guilty of carelessness and negligence in that he did not give or cause to be given any notice to plaintiff as to the location of the stairway in said building leading from said 4th floor, nor did he have or maintain a sufficient number of such stairways, or have any stairway properly located for plaintiff to escape. That he was guilty of carelessness and negligence in failing to operate the elevator leading to and from said 4th floor and in failing and refusing to respond to plaintiff's summons and demand to be removed from said 4th floor and in failing to direct plaintiff as to the way to escape and in that defendant did not have the hallway on said 4th floor sufficiently lighted and that he did not have any light, sign or notice of the location of the elevator.

8th. That upon awakening from sleep and then discovering, all without any help from the defendant or his employees, that said hotel was on fire, said awakening and discovery to plaintiff being long after said fire was known to defendant and his servants in that behalf and that after more than sufficient time had elapsed in which defendant and his servants could have, by the exercise of reasonable care and diligence, awakened and notified him of said fire and permitted his safe escape from the peril thereof, plaintiff with due care on his part and in order to escape from said peril, went from his room into the hallway on said 4th floor and used due diligence and care to find a means of safe escape, but being unable, by reason of the aforesaid negligence of defendant, to escape by way of the elevator or to find any stairway or other means of escape, plaintiff was forced, by reason of the aforesaid negligence, to return to his room. That up to this time plaintiff had, by reason of the aforesaid negligence of defendant, breathed large quantities of smoke and gases and was thereby

rendered dazed, weak and sick. That there was in plaintiff's room at said time, a rope furnished by defendant, which defendant negligently represented could be used for the purpose of escape from said room through the window thereof to the ground. That defendant then and there negligently furnished a rope which was unsafe, too small and insufficient for the purpose for which intended, and negligently failed to give proper directions for the use thereof and to use the same was hazardous and dangerous, but by reason of the aforesaid negligence of defendant, no other means was made known to plaintiff or could be found or used by him, and under stress of his condition, surroundings and excitement occasioned by the aforesaid negligence of defendant and to escape the imminent peril threatening plaintiff as aforesaid, he was compelled to use said rope and apparent means of escape and with due care on his part he attempted to escape by means of said rope to the ground, but by reason of the aforesaid negligence of defendant he was injured and fell in so doing, to his injury and damage hereinafter stated.

9th. That by reason of the aforesaid carelessness and negligence of defendant and his said employees, plaintiff thereby received and suffered inflammation and congestion, friction burns on both hands, nervous shock, fracture of several bones of the right foot and ankle, communuted fracture and dislocation of the right ankle, spraining of the muscles and tendons, laceration and cutting of the nerves and blood vessels and bruises in the region of said injuries, and body bruises and lacerations. That he was thereby rendered sick, lame, deformed and disabled, he was compelled to go to a hospital for treatment, his leg was enclosed in a cast and he was and will be greatly inconvenienced, suffered, now suffers and will continue to suffer great pain of body and mind; that he was compelled to incur expenses for medical, surgical and hospital care and treatment in the sum of $400 and upwards and he will be compelled to incur further expense for further treatment; that

at the time of said injuries plaintiff was a traveling salesman and was earning and he had an earning capacity of from $250 to $300 per month and by reason of said injuries he became wholly incapacitated and has lost 4 months full time next following said accident and he has since lost additional time and will be compelled to lose further additional time of the value of $300 per month and his earning capacity and ability has been permanently impaired. That plaintiff's said injuries are serious, painful and permanent, his ankle and leg have been thereby permanently enlarged, stiffened and weakened, and he is rendered a cripple for life; that plaintiff has in the premises been damaged by defendant in the sum of $15,000.00 and upwards.

Wherefore, Plaintiff prays judgment against the defendant for $15,000.00 and costs.

EMIL J. STRAHL,
Plaintiff.
By JNO. A. MOORE,
His Attorney.

State of Nebraska, County of Douglas, ss:

John A. Moore being first duly sworn, says that he is attorney for the plaintiff; that plaintiff is a non-resident of and absent from Douglas County, Nebraska, and affiant therefore verifies for him; that the allegations in the foregoing petition are true as affiant verily believes.

JNO. A. MOORE.

Subscribed in my presence and sworn to before me this ..... day of December, A. D. 1911.

Signature of Notary.

.....

(Notarial Seal.) Notary Public.
(Com. Exp., etc.)

AMENDED ANSWER.

Within and for the County of Douglas. Doc. 114, No. 99.

Emil J. Strahl, Plaintiff, vs. Rome Miller, Defendant.

Comes now the defendant in the above entitled cause and answering plaintiff's petition denies each and every allegation therein contained excepting such as may be hereinafter admitted to be true.

This defendant admits that the plaintiff was a guest at the Millard Hotel on the night of January 22, 1911, and occupied a room located on the fourth floor which is the fifth story of said hotel building.

Defendant further alleges that any injuries which plaintiff may have received on the night of January 22, 1911, while a guest at said Millard Hotel, were due and owing to and caused by the negligence of said Emil J. Strahl as hereinafter stated, and which said negligence directly contributed to and caused said injuries and without which said negligence of the said Emil J. Strahl said injuries would not have been received by him; that said Emil J. Strahl during four years prior to January 22, 1911, had been a regular guest at said Millard Hotel, stopping there on the average of eight or ten times in each year, and had occupied various rooms in said hotel, including rooms located on the aforesaid fourth floor of said hotel building; that said hotel building on the night of January 22, 1911, and during the four years prior thereto, was fully equipped with fire escapes located on the outside of said building, had signs on the walls of the halls of said hotel showing the location of said fire escapes, had incandescent red electric lights running day and night in all the halls of said hotel and showing the location of said fire escapes; that on the night of January 22, 1911, and all of the four years preceding said time said hotel building had more than two stairways leading up to the third floor or fourth story thereof, and had two stairways leading to the fourth floor or fifth story of said hotel building. That on the night of January 22, 1911, and for two

years prior thereto every guest room in said hotel on and above the second floor thereof was equipped with a rope fire escape; that on the night of January 22, 1911, and for four years prior thereto it was the custom in said hotel not to have an elevator boy employed for the sole purpose of operating the elevator after 1 A. M., but said elevator would be operated after 1 A. M. only occasionally and when the duties of the bellboy who was employed to operate the telephone system in said hotel, would not require his attention and time for the operation of said telephone system; that said Emil J. Strahl had many an opportunity both on the night of January 22, 1911, and during the four years prior thereto, to acquaint himself with the means and methods of egress from said hotel in the event of fire, but the said Emil J. Strahl carelessly and negligently failed to acquaint himself on the night of January 22, 1911, or prior thereto, with the means of egress from said hotel and to acquaint himself with the location and situation of the fire escapes and stairways and the method and manner in which the rope fire escapes were operated, and owing to such carelessness and negligence on the part of said Emil J. Strahl as above stated said Emil J. Strahl received whatever injuries he suffered on the morning of January 23, 1911.

Wherefore, Defendant prays that said cause be dismissed and that it recover its costs herein expended.

EDGAR M. MORSMAN, JR.,
Attorney for Defendant.

State of Nebraska, County of Douglas, ss:

Rome Miller being first duly sworn on his oath, says he is the defendant in the above entitled cause; that he has read the foregoing answer; knows the facts therein stated and believes the same to be true.

ROME MILLER.

Subscribed in my presence and sworn to before me this 4th day of November, A. D. 1912.

CHARLES LESLIE,
Judge.

REPLY TO AMENDED ANSWER.

In the District Court of Douglas County, Nebraska. Doc. 114. No. 99.

Emil J. Strahl, Plaintiff, vs. Rome Miller, Defendant.

Comes now the plaintiff and for his reply to the Amended Answer of the defendant, he denies each and every allegation in the plea of contributory negligence in said Amended Answer contained and he denies that he was guilty of contributory negligence and he denies that he was negligent in any manner.

Wherefore, Plaintiff prays as in his petition.

JNO. A. MOORE,
Attorney for Plaintiff.

State of Nebraska, County of Douglas, ss:

Emil J. Strahl being first duly sworn, deposes and says that he is the plaintiff named in the above entitled action; that he has read the foregoing reply to the Amended Answer of the defendant and the facts therein stated are true as he verily believes.

EMIL J. STRAHL.

Subscribed in my presence and sworn to before me this 8th day of November, 1912.

H. T. DANIEL,
Notary Public.

JUDGMENT.

In ths District Court of Douglas County, Nebraska. Doc. 114. No. 99.

Emil J. Strahl, Plaintiff, vs. Rome Miller, Defendant.

This matter coming on for hearing on the motion of the defendant for a new trial, and the court being fully advised in the premises, it is hereby ordered that said motion be and the same hereby is overruled, to which ruling the defendant duly excepts and is given forty days from the rising of this court in which to prepare and serve a bill of exceptions. Heretofore, to-wit, on the 12th day of November,

1912, the jury herein empanelled and sworn returned its verdict in writing in favor of the plaintiff, and assessed his damages in the sum of $6,500.

It is therefore considered, ordered and adjudged that the plaintiff, Emil J. Strahl, have and recover from defendant, Rome Miller, the sum of $6,500.00, together with interest thereon at seven per cent, per annum from the 12th day of November, 1912, and his costs herein expended, taxed at $.....

Proceedings are now adjourned as shown by order in Journal 132, of this date.

CHARLES LESLIE,
Judge.

SUPREME COURT OF STATE OF NEBRASKA.

OPINION.

MORRISSEY, C. J. Appellee, Emil J. Strahl, January 22, 1911, became a guest at the Millard hotel, in Omaha; the hotel being owned by appellant, Rome Miller. The building was five stories high, and had more than 50 rooms, and was not of fireproof construction. Appellee was assigned to room 404, which was on the fourth floor of said hotel and retired about 10:30 p. m. During the night a fire occurred in the hotel, and appellee undertook to escape by means of a rope fire escape, and in doing so suffered bodily injuries. He brought this suit in the district court for Douglas county against the proprietor of the hotel alleging that while he was a guest at said hotel a fire broke out therein, and that by reason of the negligence of defendant and his employes it was not properly discovered or controlled, and that a portion of the hotel was burned; that the halls were filled with smoke and gases, endangering the lives of the guests and inmates; that appellant and his employes failed and neglected to awaken or give notice to the appellee of the existence of the fire; that appellant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined, or inspected for the purpose of

guarding against fire and safeguarding the lives of the guests, and that the employes of the appellant neglected and carelessly failed to be at their posts of duty, etc.; that the appellant was guilty of negligence in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung the fire gong on the floor on which appellee was sleeping, nor did he ring or cause to be rung a telephone in the room occupied by appellee or in any way awaken or arouse appellee to notify him of the existence of the fire, nor did he give or cause to be given to appellee information as to the location of the stairways leading from the fourth floor, and that the hotel was not equipped with a sufficient number of stairways, and that appellant was negligent in failing to operate the elevator leading to and from the fourth floor, and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign, or notice indicating the location of the elevator; that appellee's room was equipped with a rope fire escape, which appellant represented could be used in escaping from said room in case of fire, and that said fire escape was too small, and was insufficient for this purpose, and that appellant negligently failed to give appellee proper directions for the use of said rope fire escape; that by reason of the said negligence of appellant he has been damaged in the sum of $15,000. The answer denies all the averments of negligence contained in the petition, and contains an affrmative defense of contributory negligence. There was a trial to a jury, and a verdict of $6,500 for appellee, and appellant brings the cause here for review.

The evidence discloses that appellee went to his room on the fourth floor of the hotel about 10:30 p. m.; that he awoke about 3:30 a. m., and about five minutes thereafter he detected the odor of smoke; that he arose and turned on the electric light, opened the door, and took down the telephone receiver and asked the office where the fire was, but received no

response; he then dressed and went to the elevator shaft, feeling his way along the walls; that the smoke was so thick he could not see the light in the hall; that when he reached the elevator it was not running, but he heard some one holler, "Take the stairway;" that he did not know the location of the stairway, and returned to his room, tried to telephone the office, but received no response, untangled the rope fire escape, threw it out of the window, and tried to go down hand over hand. He testified that he had looked over this fire escape the evening before, and commented to himself, "Well, in case of fire, a fellew would have a fat chance of getting down on that rope it is so thin;" that it was equipped with a metal piece to regulate the speed of descent, but that this metal piece would not work; and that he slid down the rope, finally landing on a platform below, and sustained the injuries of which he complains.

His wife and son testified that they visited the room the next morning and that the rope was very thin. They describe it as being like a "window cord" and the son claims to have thrown the rope out of the window, and that it did not reach within several feet of the platform below on which the appellee fell. Appellant offered in evidence a five-eights inch hemp rope fire escape, equipped with a patented metallic appliance to facilitate its use; the rope being of sufficient length to reach from appellee's room to the landing below. Appellee denies that this is the rope fire escape which was in his room the night of the fire, and on this question there is a direct conflict of the evidence.

It is undisputed that the smell of smoke was detected by one of the employes in the hotel about 1:30 a. m., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter, might be burning there, and this was two hours before the appellee awoke to find the halls filled with smoke. These facts, together with the testimony relating to

the fire gongs, fire escape, and the general conduct of appellant's agents, were all properly submitted to the jury.

(1-3) Exceptions are taken to the instructions of the court, and it is insisted by appellant that no common-law liability rests upon an innkeeper to protect his guests from injury by fire, and that the act of 1883 relating to innkeepers contravenes both the state and federal Constitutions, in that it deprives the innkeeper of life, liberty, and property without due process of law. These points we do not think are well taken. The weight of authority upholds the doctrine of a common-law liability. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power so to do. Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. (N. S.) 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682. Section 3104, Rev St. 1913, the act complained of reads as follows:

"In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock p. m., and 6 o'clock a. m., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

This is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest. While an innkeeper is not an insurer

of the safety of his guest, yet he may not omit to do the things that are reasonably necessary for his safety and protection. 11 Am. & Eng. Ency. Law (1st Ed.) 32. The law seems to be well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide. "The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect evidence of its violation as going to show negligence." 21 Am. & Eng. Ency. Law (2d Ed.) 483, and cases cited; Wolf v. Smith, 149 Ala. 457, 42 South. 824, 9 L. R. A. (N. S.) 338.

(4) Exceptions were taken to the instructions given by the court; but the instructions appear to be based upon the evidence, and, taken as a whole, no prejudicial error is disclosed.

The question of contributory negligence was properly submitted. The jury were told that:

If "failure of the said plaintiff to exercise the care that a man of ordinary prudence would have exercised in the circumstances was the proximate cause of the alleged injury, then the defendant is not liable, * * * even though you might also find that the defendant was negligent in not discovering the fire earlier, or in not notifying the plaintiff promptly of its existence."

No complaint is made of the amount of recovery. The issues appear to have been properly submitted to the jury, and the judgment is affirmed.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, No. 18021.

Supreme Court of Nebraska, January Term, A. D. 1915. March 13.

Emil J. Strahl, Appellee, vs. Rome Miller, Appellant.

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellant, taxed at $..... For all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. MORRISSEY,
Chief Justice.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No.....

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO AFFIRM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

STATMENT.

The only federal question involved in this case is whether or not an act entitled "An Act for the Security of Guests and Lodgers in Hotels Against Injury from Fires," enacted by the Legislature of Ne-

braska in the year 1883, contravenes any of the provisions of the constitution of the United States. For the convenience of the court here, we print the entire act as follows:

"Sec. 1. It is hereby made the duty of every keeper or owner of every hotel or lodging house in this state, of over two stories in height, to provide and securely fasten in every lodging room above the second story which has an outside window and is used for the accommodation of guests or employees, a rope or rope ladder for the escape of the lodgers therein, in case of fire, of at least one inch in diameter, which shall be securely fastened within such room, as near a window as practicable, and of sufficient length to reach therefrom to the ground on the outside of such hotel or lodging house, and made of strong material and as secure against becoming inflamed as practicable. Such rope or rope ladder shall be kept in good repair and condition. In lieu of a rope or rope ladder there may be substituted any other appliance that may be deemed of equal or greater utility by the fire department, or such other authority as may have the control of fire regulations in the city or town where such hotel or lodging house is located; but such appliance shall, in all cases, be so constructed as to be under the control and management of any lodger in such room.

"Sec. 2. The owner or owners of every hotel or lodging house in this state, over three stories in height, shall provide without delay such hotel or lodging house with permanent iron balconies, with iron stairs leading from one balcony to the other, to be placed at the end of each hall above the third story, in case such hotel is over one hundred feet in length, and in other cases such number as may be directed by the fire department, or such other

authority as may have the control of fire regulations in any city or town where such hotel or lodging house is located. Such balconies and iron stairs shall be constructed at the expense of the owner of such hotel or lodging house.

"Sec. 3. It shall be the duty of every such proprietor or keeper of any hotel or lodging house to post notices in every such room of such hotel or lodging house, calling attention to the fact that this act has been complied with, and the part of such room where such coil of rope or rope ladder is fastened.

"Sec. 4. Any violation of any of the provisions of this act hereinbefore contained shall be deemed a misdemeanor and indictable as such; and any person convicted thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars and costs of prosecution, and imprisoned until such fine and costs are paid.

"Sec. 5. In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of nine o'clock p. m., and six o'clock a. m., and in case of fire he shall instantly awaken each guest and all other persons therein and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein, to give notice of same to all guests and inmates thereof at once, and to do all in their power to save such guests and inmates.

"Sec. 6. Should such watchman leave his post of duty in such hotel or lodging house for more than fifteen minutes at any one time during the hours specified for him to be on watch, or if he shall sleep while on duty, or if he shall fail to awaken the persons sleeping in such hotel or lodging house, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars nor more than five hundred dollars.

"Sec. 7. Every proprietor of such hotel or lodging house who shall fail to comply with the requirements of section five (5) of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in the same manner as is provided in section four (4) of this act.

"Sec. 8. This act shall be given in charge to the grand jury at each session. And they shall make due inuiry and indict and bring to trial all parties found guilty of violating any of its provisions.

"Sec. 9. All fines imposed or collected for any violation of the provisions of this act shall be paid to the treasurer of the county where such offense is committed for the use and benefit of the common school fund.

"Sec. 10. All hotels or lodging houses hereafter constructed in this state over two stories in height and over one hundred feet in length, shall be constructed so that there shall be at least two stairways for the use of the guests leading from the ground floor to the uppermost story. And all out doors shall be so hung that they shall open on the outside instead of the inside of such hotel."

During the month of January, 1911, Miller was the owner and proprietor of the Millard Hotel in the

City of Omaha. Strahl was a guest and occupied a room on the fourth floor of the hotel building. The hotel had more than fifty rooms and was more than four stories high. During the night a fire occurred in the hotel building, and Strahl attempting to escape by means of a rope fire escape, provided in his room for that purpose, was very seriously injured. He brought suit against Miller in the District Court of Douglas County, charging Miller with negligence in the following particulars:

"1. That the defendant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests, and that the employes of the defendant negligently and carelessly failed to be at their posts of duty to respond to the warnings given them and the defendant of the existence of the fire.

"2. That the defendant was further guilty of negligence in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung a fire gong on the fourth floor, or ring or cause to be rung a telephone in the room occupied by the plaintiff, or in any other way awaken or arouse the plaintiff or notify him of the existence of said fire.

"3. That the defendant was guilty of carelessness and negligence in not giving or causing to be given any notice to plaintiff as to the location of the stairway leading from the fourth floor, and did not have or maintain a sufficient number of stairways; and that he was negligent in failing to op-

erate the elevator leading to and from the fourth floor and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign or notice indicating the location of the elevator. And,

"4. That plaintiff's room was provided with a rope furnished by defendant, which defendant represented could be used for the purpose of escaping from said room in case of fire, and that said rope so furnished as a means of escape was too small and was insufficient for the purpose for which it was intended, and that defendant negligently failed to give plaintiff proper directions for the use of said rope as a means of escape."

Judgment was entered in the District Court upon a verdict in Strahl's favor, and Miller prosecuted an appeal to the Supreme Court of the State of Nebraska. That court by its judgment entered an opinion filed March 13, 1915, affirmed the judgment of the District Court, and held that the Nebraska Hotel Act does not contravene the provisions of the constitution of the United States or deprive the Inn Keeper of life, liberty or property without due process of law, and is a valid enactment.

ARGUMENT.

I.

This motion to affirm is based upon the contention that the writ of error was taken for delay only and that the questions upon which the decision of the cause depend are so frivolous as not to need further argument.

The State Law, in so far as its provisions have any reference to this case, requires hotels more than four stories high and having more than fifty rooms to be provided with a competent night watchman, to maintain a system of fire gongs, to make a reasonable effort to advise sleeping guests of the presence and danger of fire, and to provide a rope fire escape for each room. We think these requirements are so clearly and certainly within the power of the State to prescribe that an effort to review in this Court a judgment of the State Court declaring their validity must be deemed frivolous. That the state may prescribe rules reasonably calculated to conserve the safety and promote the comfort of guests at hotels must be conceded. That the enactment of these provisions constitutes a valid exercise of the police power of the state is, it seems to us, too clear to require argument.

The rule that the state may regulate the use of property and that it may prescribe regulations designed to promote the safety, health, comfort, and convenience of its citizens is elementary. The Richmond-

Frederick & Potomac Ry. vs. City of Richmond, 96 U. S. 521, Fisher vs. St. Louis, 194 U. S. 361; California Reduction Company vs. Sanitary Reduction Works, 199 U. S. 306; Crowley vs. Christianson, 137 U. S. 86; Mugler vs. Kansas, 123 U. S. 123.

II.

It was argued in the brief and at the bar in the State Court by counsel for plaintiff in error that the failure to observe the statute was not evidence of negligence. The Supreme Court of Nebraska followed the rule announced in the case of Frontier Steam Laundry vs. Connelly, 72 Neb. 767, holding that if the duty imposed by the statute is intended for the benefit and protection of individuals or their property, then the violation of the rule prescribed is evidence of negligence upon which a recovery may be predicated; where on the other hand it is apparent that the duty is plainly for the benefit of the public at large and not for the benefit of individuals or a class of individuals, then the individual acquires no rights, and a violation of the rule gives him no right of action. We do not understand this to be a federal question.

III.

It was further urged that the law imposing upon the hotel keeper in case of fire the duty to notify guests and inmates of the fact ought not to be held valid, because the circumstances might be such that it might be dangerous to perform this service. There is no force in this argument. The rule imposing an

affirmative duty, whether a statutory provision or a rule of the common law, must be read, construed and applied with the exercise of reason and common sense. Undoubtedly if a case should arise where it appeared that the notice could not be given, by reason of the danger incident to the performance of the service, it would be held, and properly so, that the breach of this duty was not evidence of negligence. The question does not arise in this case, and it will be time enough to give it consideration in a case where such question is presented. In Clancy vs. Barker, 71 Neb. 83, the Supreme Court of Nebraska declared the rule to be "the hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so." Of the law thus construed no just complaint can be made.

IV.

It was further urged that the Nebraska statute imposes a penalty upon the hotel keeper for a violation of its provisions, and that the provision respecting the safety of guests and inmates is so indefinite that the penalty ought not to be enforced, and that for this reason the law should be deemed invalid. It is not necessary in the case at bar to determine whether that portion of the statute requiring the hotel keeper and watchman to do all in their power to warn and rescue guests is enforcible under the penalty section. If excluded from the criminal section, it would still stand as the rule of civil conduct, for the penalty is simply an incident to the purpose for which the act

was passed, and it cannot be said to be the inducing cause for the passage of the act, or that the failure of the penalty in this regard would render the statute otherwise unenforcible.

> "Breach of the statutory duty to keep bandages, oil, stretchers and blankets for the use of persons injured in the mine will give a right of action to an employee injured thereby, although the statute provides no penalty for its breach and provides no remedy for failure to comply with its terms and the primary injury was not due to negligence for which the mine owner was responsible." (Wolfe v. Smith, 149 Ala. 457.)

In Wyatt vs. McCreery, 111 New York, Suppl. 86, it is held that the fact that a part of a statute, making a person violating its provisions, guilty of a misdemeanor, may be unconstitutional, is not material in passing on the question of the right of civil action and remedy.

V.

The suggestion that the statute makes the inn keeper liable as an insurer of the safety of his guests is not supported either by the language of the statute or the construction placed upon it by the Supreme Court of the State of Nebraska.

In conclusion we submit that the appeal made to the jurisdiction of this court in this case possesses no merit, and the judgment of the Supreme Court of the State of Nebraska ought to be affirmed.

Respectfully submitted,

H. C. Brome,
Clinton Brome,
H. S. Daniels.
Attorneys for Defendant in Error.

In the Supreme Court of the United States

ROSSA MILLER,
Plaintiff in Error,

v.

ERIC I. STRAHL,
Defendant in Error.

No. 458

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY ON BEHALF OF PLAINTIFF IN ERROR OPPOSING MOTION OF DEFENDANT IN ERROR TO DISMISS AND AFFIRM.

EDGAR MOREHEAD, JR.,
Attorney for Plaintiff in Error.

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In the Supreme Court of the United States

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

No.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR OPPOSING MOTION OF DEFENDANT IN ERROR TO DISMISS AND AFFIRM.

EDGAR MORSMAN, JR.,
Attorney for Plaintiff in Error.

TO SAID COURT:

The defendant in error has filed a motion to dismiss and to affirm under section 5 of rule 6 of this court, which said rule provides that the court will entertain such a motion when it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as to need no further argument. We should feel greatly chagrined and humiliated if the motion were sustained, for this

cause has not been brought to this court merely for the purpose of delay, nor are the questions raised by the record of so frivolous a character as to be capable of a decision without an argument and full consideration. We confidently predict that the writ of error sued out in this case not only presents new and interesting questions, but also that upon the final hearing of this case the court will sustain the position of the plaintiff in error and preserve to him the rights guaranteed by the constitution of the United States.

Neither the motion, nor the brief filed in support thereof by defendant in error, fully and completely set forth the questions which will be and are raised by the record. It is true that the constitutionality of the statute passed by the Nebraska Legislature in 1883 is, in a sense, the question at issue, but plaintiff in error has never contended that every part of that Act was unconstitutional. Our position has always been that certain portions of the Act as construed by the trial court and applied to this controversy, deprived Rome Miller, plaintiff in error in this court, of his liberty and of his property without due process of law, and that hence those portions of the act, and the interpretation placed thereon by the trial court, are unconstitutional.

Plaintiff's motion brings up for discussion the entire controversy, and to fully grasp the questions presented by the record, we think it necessary to make a brief statement of the facts out of which the controversy between the parties hereto arose.

STATEMENT OF FACTS.

In January, 1911, Rome Miller, plaintiff in error in this court, owned and ran the Millard Hotel, which was located in the city of Omaha, Douglas County, Nebraska. The hotel was a brick building, five stories high and contained about 200 guest rooms. It was provided with two stairways for guests leading from the first floor to the top of the building, also a passenger elevator and a servant's stairway. On the outside of the building were six or seven metallic fire escapes. Fire gongs were located on each floor in all of the halls, and every precaution had been taken to provide the guests with ample means of escape in the event fire should break out. On the night of the 22nd of January, 1911, at about three hours past midnight, a fire broke out in the hotel. No claim was ever made that the proprietor, or any employee, was in any manner responsible for, or caused the fire. Emil J. Strahl, defendant in error in this court, was a guest of the hotel, and at the time of the fire he was asleep in his room on the fifth floor. Awakened by the noise and commotion, he opened the door of his room and found the hall full of smoke. Putting on his clothes and dressing, he left his room, made his way down the hallway to the elevator, which was not being operated on account of the density of the smoke. Finding that the elevator was not running he made his way back to his room, but in so doing was practically overcome by the smoke. He then threw a rope from the window of his room and attempted to make his escape by going down hand over hand, but in doing so he fell and sprained his ankle.

Following the fire Strahl brought suit against Miller and recovered a judgment for $6,500.00 on account of his

sprained ankle and nervous condition caused by the injury, the smoke and the fright, and his right to recover was based upon the claim that Rome Miller, the proprietor of the hotel, likewise the watchman and the other employees, failed to notify Strahl of the existence of the fire, failed to awaken him and failed to do all in their power to rescue him from the fire unhurt.

THE CONSTITUTIONAL QUESTION Raised BY THE RECORD.

In 1883 the Nebraska Legislature passed the statute set forth in the printed brief of defendant in error, but at a later date the first four sections of this act were expressly repealed, so at the time of the fire the part of the statute still in force was as follows:

"WHEN MUST EMPLOY WATCHMAN—AWAKEN GUESTS.—In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

"SAME—PENALTY.—Every proprietor of such hotel or lodging house who shall fail to comply with the requirements of the next preceding section shall be deemed guilty of a misdemeanor, and upon conviction

thereof shall be fined not less than one hundred dollars nor more than five hundred dollars."

"WATCHMAN GUILTY OF MISDEMEANOR.—Should such watchman leave his post of duty in such hotel or lodging house for more than fifteen minutes at any one time during the hours specified for him to be on watch, or if he shall sleep while on duty, or if he shall fail to awaken the persons sleeping in such hotel or lodging house, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars nor more than five hundred dollars."

"WHEN TWO STAIRWAYS ARE REQUIRED.—All hotels or lodging houses over two stories in height and over one hundred feet in length shall be constructed so that there shall be at least two stairways for the use of the guests leading from the ground floor to the uppermost story. And all outer doors shall be so hung that they shall open on the outside instead of the inside of such hotel."

GRAND JURY.—The four next preceding sections shall be given in charge to the grand jury at each session. And they shall make due inquiry and indict and bring to trial all parties found guilty of violating any of its provisions."

(See Revised Statutes of Nebraska, 1913, sections 3104-3108 inclusive.)

At the trial of this cause in the District Court of Douglas County, Nebraska, the court, among other things, specifically instructed the jury that the plaintiff in error, Rome Miller, and all his employees and the night watchman at the hotel, owed to Emil J. Strahl the *active* duty *after the fire had broken out, as* follows: (a) to notify him (Strahl) of the existence of the fire so that he might escape unharmed. (b) To do all in their power to save him (Strahl) from the fire, and that failure to perform either of these duties made Rome Miller liable in damages. In other words, the trial court construed the Act of 1883 above mentioned, so as to make Rome Miller liable

for the penalty mentioned in the Act (fine, imprisonment and liable for damages) in the event (1) either he or the watchman or any employee in the hotel *failed to do all in their power* to save Emil J. Strahl from the fire free of injury or (2) either the proprietor of the hotel (Miller), the watchman, or any other employee, failed to awaken and notify Strahl of the existence of the fire.

No objection was ever made by plaintiff in error at any stage of the proceedings, as to any duty laid upon him by the statute to prevent fires, or to take precaution against fires, or to afford the guests of the hotel every possible means of escape, but plaintiff in error contended that the statute, in so far as it placed upon him certain duties to be performed after the fire broke out, and in the face of manifest danger, and failing to perform such duties, caused him to become liable to fine and imprisonment, and in this case made him liable for $6,500.00 damages, deprived him of his life, liberty and property without due process of law.

The judgment rendered by the District Court of Douglas County, Nebraska, was appealed to the Supreme Court of that State, where plaintiff in error urged that the Act of 1883 as applied by the lower court contravened the federal constitution because it deprived him of life, liberty and property without due process of law. This contention was based upon the following propositions:

1. The statute requiring the inn-keeper, and all his employees, in the event fire breaks out, TO DO ALL IN THEIR POWER to save the guests and failing so to do makes the inn-keeper liable to imprisonment, fine, or to be mulct in damages, is too indefinite and fails to prescribe any fixed rule of conduct. TO DO ALL IN ONE'S POWER fails to inform a man of ordinary intelligence what he must or must not do under given circumstances. The jury at a later date, and not the statute, determines

what acts are commanded or prohibited by the statute, and the calm deliberate decision of the jury in their jury box, and not in the presence of a great conflagration, decides what the statute means and what the inn-keeper should have done.

2. To warn Strahl of the fire, or to save him unhurt from the fire, required the inn-keeper or the watchman, or some other employee, to place themselves in a position of as great danger as confronted Strahl. It is beyond the power of the Legislature to compel a citizen to risk his life to save another, and failing so to do make him liable to fine, imprisonment and damages. The Legislature can require the inn-keeper to take precaution against fire, to provide all manner of fire escapes and exits, to keep and maintain a watchman, an engineer or any required number of employees, and it is very possible that the Legislature can make the inn-keeper liable for all damages if he fails to prevent fire from breaking out. It is within the police power to require of the inn-keeper practically any and everything before fire breaks out, but it is not within the power of the Legislature to command that the inn-keeper, *after the fire breaks out*, should risk his life, or that any of his employees should risk their lives, to save the lives of the guests. There is a decided difference between a statute requiring an inn-keeper to do certain acts before the fire occurs, and a statute which commands him after the fire occurs at the risk of his own safety to save his guests.

The Supreme Court of the State of Nebraska overruled the contention of plaintiff in error, held that the Act of 1883 as applied to this case by the trial court was constitutional and within the police power of the Legislature, and to review that decision and final judgment, Rome Miller, plaintiff in error, has sued out this writ of error.

BRIEF.

1. A writ of error is not granted as a matter of right, for it lies in the discretion of the Judge to grant or refuse the same. The Chief Justice of the Supreme Court of the State of Nebraska granted the writ of error in this case, and surely he never would have done so had he thought the constitutional objections urged against the statute by the plaintiff in error were purely frivolous.

2. The trial court placed upon the statute an interpretation which permitted the jury to hold Rome Miller liable in damages if they should find from the evidence that either the proprietor of the hotel (Rome Miller), or any of his employees, had failed *to do all in their power* to save Strahl unharmed from the fire.

The statute, or the interpretation placed thereon by the instructions of the Court, which requires an inn-keeper *to do all in his power* to save his guests from a fire, is so indefinite that it fails to prescribe any fixed rule of conduct by which the inn-keeper can guide his actions and, therefore, the taking of life, liberty or property based upon an alleged violation of such a statute (failure to do all in one's power), does not constitute due process of law.

Collins vs. Kentucky, 234 U. S. 634.

International Harvester Co. vs. Kentucky, 234 U. S. 216.

State vs. Mann, 2 Ore. 238.

Cook vs. State, 26 Ind. App. 278.

U. S. vs. Capital Traction Co., 34 App. D. C. 592.

Brown vs. State, 137 Wis. 543; 119 N. W. 338.

Tozer vs. U. S., 52 Fed. 917.

R. R. Com. vs. Grand Trunk, 100 N. E. 852.

U. S. vs. Reese, 92 U. S. 214.

American School vs. McAnnulty, 187 U. S. 94.

Czana vs. Board of Medical Sup., 25 App. D. C. 443.

The statute imposes a fine and imprisonment. It likewise places upon the grand jury the duty of inquiring into all violations of the Act. The court has interpreted the statute as imposing a civil liability for damages upon the person violating it.

The clause of the federal constitution prevents not only the taking of life and liberty, but also the taking of property without due process of law. The statute can not be held unconstitutional as to the criminal penalty and be held valid so far as the civil liability is concerned. If the statute through its criminal liability deprives a person of life and liberty without due process of law, it must necessarily through the civil liability deprive a person of property without due process of law. The statute, so far as the federal question involved is concerned, can not be constitutional for the purpose of taking one's property and unconstitutional for the purpose of depriving one of life and liberty.

3. Among other things, the statute provides that the watchman, in case of fire, shall instantly awaken each guest and inform him of the fire. It further provides that the proprietor, in case of fire, shall give notice thereof to all guests and inmates thereof at once. The court instructed the jury that if the watchman failed to at once awaken Strahl and notify him of the fire, or if the proprietor, or any of his employees, should fail to give Strahl notice of the fire, or to do all in their power to save Strahl, Rome Miller would be held liable in damages. In order that the watchman could awaken Strahl and notify him of the fire it was necessary for the watchman to go to Strahl's room, and that meant the watchman must place himself in a position of as great danger as was Strahl.

In order that the proprietor, or any other employee, could give Strahl notice of the fire, it was necessary that such person should go to Strahl's room and thus place himself in as great a position of danger as was Strahl. The statute thus interpreted required of the watchman, of the proprietor and of every other employee, that they must risk their life in order to awaken and notify Strahl, and it is the contention of plaintiff in error that to deprive a man of his life and liberty (imprisonment), or of his property (fine or liability in damages), because he fails to risk his life to save the lives of others, does not constitute due process of law.

Jacobson vs. Mass., 197 U. S. 11.

Gastineau vs. Kentucky, 108 Ky. 473, 56 S. W. 705.

Hichinger vs. City of Maysville, —— Ky. ——

4. At common law the inn-keeper owed no duty to protect his guests from fire.

Hare vs. Henderson, 43 Upper Canada Queen's Bench 571.

Clancey vs. Barker, 66 C. C. A. 469.

5. An inn-keeper has never been an insurer of the safety of his guest and such is the express statement made by the Supreme Court of the State of Nebraska in this case.

(See opinion in transcript.)

ARGUMENT.

The statute is an exercise of the police power of the state, and before proceeding with our argument, we desire to restate our position, in order that there may be no misunderstanding concerning the same. It is not our contention that the police power of the state can not protect the lives and property of its citizens, and that statutes having such an intent are not a proper exercise of the police power. The statute under consideration requires the inn-keeper to employ a watchman; requires the watchman to be on duty during certain hours; requires the hotel to be equipped with fire gongs; requires that there shall be two stairways and that all outer doors shall be so hung as to open outward. These provisions are perfectly proper and constitute a valid exercise of the police power. A full compliance with each and every one of these provisions can be had on the part of the inn-keeper before fire breaks out, and at a time when the inn-keeper's life is not in danger. A statute requiring the inn-keeper to take certain precautions against fire would be perfectly valid. Possibly a statute making the inn-keeper the absolute insurer of the safety of his guests and requiring the inn-keeper at his peril to prevent fires might be constitutional. But such questions are not raised by the writ of error in this case. Plaintiff in error is complaining of the civil liability placed upon him because he and his employees failed to perform certain acts after the fire had broken out, and at a time when the lives of the employees were in as great danger as was the life of Strahl, for whom the said acts should have been performed. The life of each employee and the life of the inn-keeper are as valuable to the state as is the life of

Strahl. In the face of danger from fire one has a constitutional right to take to his heels if he so desires, and the state has no power to make a citizen risk his own life to protect life of another. Such power can only be used in case of war. As we have already stated it may lie within the power of the state to make the inn-keeper liable for failure to prevent fires, but an entirely different question is presented by this record. The statute under consideration, and as applied to this case, made Rome Miller liable in damages for failure to himself perform, or to have performed at a time when the fire was raging, either of the following acts: (a) have the watchman instantly awaken Strahl, (b) have the watchman notify Strahl of the fire, (c) have the watchman and every other employee do everything in their power to save Strahl unharmed.

Point One. To do all in one's power to save Strahl is so indefinite as to constitute no fixed rule of conduct by which any reasonable man can guide his actions.

The statute which imposes upon a person the duty of performing certain acts must be so definite that every person of average intelligence can know and appreciate what course of conduct is required of him. Does the phrase "to do all in one's power to save his guests" fulfill this requirement. Who is to be the judge and when is the decision to be made as to whether or not the inn-keeper and his employees did all in their power to save Strahl? Fire is a common enemy, as dangerous to the inn-keeper and to his employees as to the guests of the hotel. Some times fire completely paralyzes people with fright. The first thought of every person when confronted by fire is always to save himself. Those who think of others in the presence of danger receive our

applause and medals of honor, but what lies in the power of the ordinary inn-keeper to do may be far different from that which lies in the power of the heroic man to accomplish. A man with a wife and children will hesitate to do things in the presence of danger, when were it not for his family, he would not hesitate one moment to risk his life. To do all in one's power means one rule of action for one man, another rule of action for another man and a different rule of action for each of these men on different days.

The rule of reason can not be called upon and the claim be made that the statute means that the inn-keeper and his employees must do all that could *reasonably* be expected of them because (1) the Supreme Court of Nebraska gave no such interpretation to the statute and secondly the actions of persons in the presence of fire and danger are not and can not be controlled by calm judgment nor be judged by the rule of reason. A hunter around the camp fire is sure of bagging his game, but when he sees the game he may have "buck fever." The golf player dreams of never missing a 4 foot put, but when victory or defeat hangs upon such a put, can he do it? It is largely a question of nerve, and sometimes we have the nerve and sometimes the nerve is lacking. The same thing applies to the inn-keeper and his employees at the time of a fire. On one occasion they may have the nerve to perform certain heroic acts. They may be so calm as to know absolutely what should be done for every one of the 200 guests in the hotel, but upon another occasion under identically similar circumstances, the nerve and judgment may be lacking. Possibly a coward might bring himself to do certain heroic acts if he knew absolutely that failure to perform such acts would make him liable in damages. It seems to the writer that the fore-

going remarks clearly establish the fact that the statute fails to point out to the inn-keeper with sufficient clearness what course of conduct is expected of him and his employees during the existence of a fire and in the presence of danger, so that he may escape the penalty of the statute. The jury safely seated in the jury box and after the fire, when hindsight is always better than foresight, are made the judges of what duties the statute by the phrase "do all in their power to save guests" imposes upon the inn-keeper and his employee. We might go one step further and insist that a man who has never been confronted by danger or a fire is absolutely incompetent to say what the average man will or will not, can or can not do under those circumstances.

But the point we are now making is not an entirely new proposition, and in the case of *International Harvester Company vs. Kentucky,* 234 U. S. 216, and *Collins vs. Kentucky,* 234 U. S. 634, this identical question was before this court. In those cases the statute of Kentucky was held to deprive a person of life, liberty and property without due process of law because it required him at his peril, to ascertain and know what the *real or market value* of an article was under certain assumed circumstances. In the Harvester case, Mr. Justice Hughes, speaking for the court says:

> "The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be "the market value under fair competition, and under normal market conditions." 147 Ky. 566. *Com. v. National Harvester Co.,* 131 Ky. 551, 576, 133 Am. St. Rep. 256, 115 S. W. 703; *International Harvester Co. v. Com.,* 137 Ky. 668, 577, 678, 126 S. W. 352. We have to consider whether, in application, this is more than an

illusory form of words, when, nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from 10 to 15 per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent and labor 27½ per cent. Whatever doubt there may be about the exact figures, we hardly suppose the fact of a rise to be denied. But, in order to reach what is called the real value,—a price from which all effects of the combination are to be eliminated,—the plaintiff in error is told that it can not avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and

> the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

It is not constitutional for the Legislature to prescribe one rule of conduct for one inn-keeper and a greater or less requirement for another inn-keeper. "To do all in their power to save guests" must mean a certain fixed rule of conduct, and we insist that the inn-keeper has no means of knowing what is required of him and his employees under the circumstances. Bear in mind that we are not dealing with precautions required of the inn-keeper prior to the fire; nor with acts required of him to prevent fires, but we are dealing with the requirements placed upon him by the statute while the fire is raging, when the hotel is full of smoke and at a time when two men lost their lives and many were injured. It is far easier to guess what would be the value of the tobacco crop under certain circumstances than to ascertain and know before hand what lies in one's power to do to save people from a burning building. Every day tobacco growers are trying to figure out what is to be the value of tobacco under certain conditions. But fires are not of such common occurrence that people generally know what should or should not, what can or can not be done to save people from a burning building. Strahl would have

been saved unharmed had he remained quietly in his own room, but he tried to escape and was injured in making his escape. Should the inn-keeper have known that the fire would not reach Strahl's room and have notified him of that fact and calmed his fears, or should the inn-keeper, at the risk of his life, have passed through the burning portion of the building in order to reach Strahl's room and fearing the fire would progress further, should he then have picked up Strahl and carried him out of the burning building? Can a person know before hand what the statute requires of him when it says that he must do all in his power to save his guests? At the time a person always thinks he acts for the best.

In *Collins vs. Kentucky,* 234 U. S. 634, Mr. Justice Hughes, speaking for the court, says that the Kentucky statute in its reference to real value prescribed no standard of conduct that it is possible to know; that it violated the fundamental principal of justice embraced in the comprehension of due process of law in compelling men, on peril of indictment, to guess what their goods would have brought under other conditions not established.

In *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, this court said that the treatment of disease by the influence of mind was a mere matter of opinion and, therefore, receiving money as pay for such treatment could not be held to be obtaining money by false pretense or promise. To do all in one's power to save another is purely a matter of opinion.

In *Brown vs. State,* 137 Wis. 543; 119 N. W. 338, the Supreme Court of Wisconsin says that a law which takes away one's property and liberty as a penalty for an offense must so clearly define the acts on which the penalty is declared that no ordinary person can fail to understand his duty and the departure therefrom which the

law condemns, since one can not be said to violate a statute which is so contradictory or blind that he must guess what his duty is thereunder.

In *Trozer vs. U. S.*, 52 Fed. 917, Justice Brewer stated that "in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury now thinks it reasonable or unreasonable. There must be some definiteness and certainty."

In *Czarra vs. Board of Medical Supervision*, 25 App. Dist. of Columbia, 443, the court held that the act of Congress conferring upon the Board of Medical Supervisors the right to revoke the license of a medical practitioner for "unprofessional or dishonorable conduct" was unconstitutional and void on account of the indefiniteness and uncertainty, as unprofessional and dishonorable were not defined by the common law, and what conduct might be embraced within the meaning of those words was a matter of opinion only.

In *U. S. vs. Capital Traction Company*, 34 App. Dist. of Columbia, 592, the act of Congress requiring the Traction Company to operate and run a sufficient number of cars to accommodate persons, was held void for uncertainty and indefiniteness. The court stated that what constituted a sufficient number of cars was a mere matter of opinion.

In *L. & N. R. R. Co. vs. Com.*, 99 Ky. 132, the Supreme court of Kentucky held unconstitutional the act which provided that a railroad company should not charge more than a reasonable or just fare, stating that the statute leaves uncertain what shall be deemed a just or reasonable fare, and different juries might reach different conclusions on the same testimony, for the violation of the statute depends upon the jury's opinion as to

the meaning of the words "just and reasonable."

In *Hewitt vs. State Board,* 148 California 590, the statute making a physician's certificate liable to cancellation for professional misconduct if the physician issued "advertising matter containing grossly improbable statements" was held unconstitutional because what should constitute "grossly improbable statements" was merely a matter of opinion and prescribed no fixed rule of conduct to guide the physician and inform him before hand as to what acts were prohibited.

To do all in one's power to save guests is so indefinite and uncertain that it prescribes no fixed rule of conduct. The portion of the statute requiring the inn-keeper to do all in his power to save guests deprives the inn-keeper of life, liberty and property without a process of law. The trial court gave to the statute a still broader interpretation, for it permitted the jury to hold Rome Miller liable in damages if they thought that he or any of his employees, had failed to do all in their power to save the guests. It does not help matters to say that this is a case of negligence, and that all the statute requires is for the inn-keeper to use reasonable care to save the guests, for such was not the charge given to the jury by the trial court, and such is not the interpretation placed upon the statute by the Supreme Court of the State of Nebraska. Moreover rescuing persons from fire and from burning buildings is not of such common occurrence that reasonable men have any common standard or criterion of action applicable thereto. The statute, and the interpretation placed thereon by the trial court, deprived Rome Miller of $6,500.00, interest and costs, because the jury thought that he, or some of his employees, had failed to do everything within their power to rescue Strahl.

C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.

Point Two. The statute compels the watchman and the inn-keeper and under the instructions of the trial court it was the duty of all employees in the hotel to risk their lives to save Strahl.

The hotel was five stories high and had more than 200 rooms, each room being occupied the night of the fire. The trial court permitted the jury to bring in a verdict against Rome Miller if they thought that the watchman had failed in his duty, or if they found that Rome Miller, or any employee, had failed to at once give notice to Strahl of the existence of the fire, or to do all in their power to save Strahl.

By instruction 2 the trial court specifically told the jury that the law of Nebraska required Rome Miller to have a competent watchman, and that in case of fire the statute required the watchman to at once give warning to all guests, and further that the inn-keeper (Rome Miller) must do all in his power to save the guests. By instruction 2½ the trial court told the jury that failure to perform the legal duties mentioned in instruction 2 made the defendant (Rome Miller) liable. By instruction 5 the trial court told the jury that Rome Miller was liable for the failure of his employees to perform the duties mentioned in instruction 2. By instruction 6 the court told the jury that if defendant could have awakened plaintiff and rescued him from the position of danger, and failed to awaken plaintiff or notify him of the fire, then the defendant (Miller) would be liable. By instruction 8 the court told the jury that if reasonably in his power the watchman should have warned Strahl of the fire and awakened him, and having failed to do so without reasonable excuse, the defendant (Miller) would be liable. By instruction 10 the court told the jury that it was the duty of Rome Miller, if he was absent from the hotel, to

see that he was represented by employees who would perform the statutory duties placed upon him, and that failure of the employee to perform these duties made Rome Miller liable. By instruction 11 the court told the jury that it was the duty of Rome Miller to give Strahl notice of the fire, and to do all in his power to save Strahl from injury by reason of the fire, and that failure to do this in person or through his employees, made Miller liable.

The trial court sustaining the constitutionality of the statute permitted the jury to assess damages against Miller in the event he, or the watchman, or any other employee, failed to notify Strahl of the fire or failed to awaken Strahl, or failed to do all in their power to save Strahl uninjured from the fire. It is true that the trial court repeatedly used the word "reasonable" in its instructions, but that does not cure the constitutional defect in the statute. The trial court charged the jury in reference to the statutory duty of Rome Miller and permitted the jury to decide whether or not this duty could have reasonably been performed in this case, but this modification would not make the statute constitutional, because the statute must clearly and definitely prescribe the duty and not permit the jury to pass in each case upon the reasonableness of the duty imposed by the statute.

L. & N. R. R. vs. Com., 99 Ky. 132.

The word reasonable as used in the instructions of the court is required because violation of a statute in Nebraska is merely evidence of negligence, and does not in and of itself constitute negligence. The opinion of the Supreme Court sustains the constitutionality of the statute in all its provisions, and says that it imposes a civil liability upon the inn-keeper for failure to properly safe-guard his guests. Failure to safe-guard Strahl consisted in the failure to awaken and notify Strahl and to do all in their power to save him.

This was a suit to recover damages, based upon negligence, and the negligence complained of was the violation of a statutory duty. The statute must stand or fall, according as the duties thereby imposed are or are not within the police power of the state. The case was not tried upon the theory of a common law liability for negligence, and the Supreme Court of Nebraska expressly based its decision upon the ground that violation of the statute gave Strahl a cause of action. The use by the trial court of the word "reasonable", in its instructions, does not cure the defect of the statute.

In all cases of negligence, there is a violation of a duty, either a statutory duty or a common law duty. Common law duties, the violation of which give rise to an action for negligence, are of such a character that all reasonable men have knowledge, or should know beforehand what course of conduct is required of them under given circumstances. Such, however, is not true in reference to a fire. Fires and the danger resulting therefrom are not of such common occurrence that every reasonable man can tell beforehand what course of conduct is expected of him, when a statute places upon him the duty "to do all in his power to save the guests."

Strahl occupied a room on the fifth floor of the burning building, and to reach his room required one to pass through that portion of the halls where there was the greatest amount of smoke. Strahl himself in passing from his room to the elevator and back again to his room, was nearly overcome by the smoke. To have awakened Strahl, to have gone to his room to notify him of the fire, to have done all in their power to save Strahl meant that the inn-keeper, the watchman and the employees must risk their lives to a greater or less extent for the purpose of saving Strahl. The hotel was five stories high, had

more than 200 rooms, and it would necessarily take considerable time for the watchman, or any other employee, to go to each room in the hotel and awaken the guests. The statute itself applies only to those hotels which have more than 50 rooms and are more than four stories in height. In every case, therefore, the notification to be given to the guests, the duty of awakening them, and of doing everything possible to save them, places upon the watchman, the inn-keeper and the other employees, the risk of losing their lives. The performance of these duties, which we contend are unconstitutional, must of necessity involve some risk to the lives of the persons upon whom the duty is laid. The unwritten law of the sea compels the captain of the boat to go down with his ship rather than leave before all others have left, but the writer is not aware that the captain or his employer, becomes liable to fine, imprisonment and damages in the event the captain should leave in the first instead of the last life boat. It does not fall within the power of the Legislature to compel a man to risk his life in any degree in a burning building to save the lives of others, and we maintain that the police power of the state is powerless to prevent an inn-keeper from taking to his heels the moment he discovers a fire, and from making his escape out of the burning building before he notifies the guests and inmates thereof of their danger. Is not the life of the inn-keeper as valuable to the state as the life of the guest, and has not the inn-keeper as great a right to protection as has the guest? Once more we ask this court to bear in mind the distinction we are making. The statute in question and the instructions of the court required of Rome Miller, and of his employees, the performace of certain duties after the fire had broken out, and when the performance of such duties was attended by more

or less danger. This is not due process of law, and in every case where the statute applies there must of necessity be danger connected with the performance of these duties. It would be an impossibility for the watchman to awaken every guest and inmate of a hotel more than four stories high and having more than 50 rooms, without going all over the hotel, without taking some appreciable length of time in the performance of the duties, and thereby running some risk of suffocation or of injury. As we have hereinbefore said, we make no complaint as to the violation of those parts of the statute which requires an inn-keeper to take precautions against fire or to provide means of escape for the inmates of the hotel in the event fire should break out, but we complain because Rome Miller is adjudged to pay $6,500.00 for the reason that he and his employees failed to perform certain acts after the fire broke out, when the fire was raging and the performance of which acts were attended with more or less danger to Rome Miller and to his employees. If such a law is constitutional, then the provision of the federal constitution protecting life and liberty becomes an empty phrase.

Rome Miller was not made liable in this case because he failed to prevent the fire, nor because he failed, prior to the fire, to equip the hotel with all necessary means of escape, nor because he started or was responsible for the fire, nor for any neglect of duty committed prior to the fire, nor because the statute had made him the insurer of the safety of his guests. But Rome Miller is deprived of his property because he and his employees failed (after the fire was raging) to perform certain acts (notify and save Strahl) which required him and his employees in the doing thereof, to run some risk to their own lives and safety. Any person who went to Strahl's room and

awakened him and notified him of the fire, would thereby place himself in as great a position of danger as was Strahl himself.

In *Jacobsen vs. Mass.*, 197 U. S. 11, the majority of this court upheld the compulsory vaccination law of Massachusetts, but the decision is based upon the ground that vaccination is harmless, and is a preventive of small-pox. In the opinion, however, Mr. Justice Harlan, speaking for the majority, expressly states that compulsory vaccination of a person whose health is such that vaccination would be a detriment, would be unconstitutional as depriving such person of his liberty or life without due process of law. In other words, where compulsory vaccination is dangerous to the health of the individual, it can not be enforced. Going to the fifth floor of a burning building, being required to notify more than 200 guests of the fire, and to awaken them, would place the watchman, inn-keeper and other employees in the same position of danger as were the guests. There is always danger when a building is on fire, and to require individuals to go about the burning building for the purpose of rescuing the inmates thereof is not commonly held to be an aid to public safety. The fire department, who are experienced in such matters, are expected to attend the fire and to do what they can to save the inmates from the burning premises. We insist that any law which deprives the inn-keeper, the watchman, or any other employee, of his constitutional privilege to devote all his energy to saving his own life when fire has once broken out, in other words, that any law which compels the watchman, inn-keeper or other employee to remain for one instant of time in the burning building deprives them of their life and liberty without due process of law.

In *Gestineau vs. Ky.*, 108 Ky. 473, the court held

that a law prohibiting a woman from going into a building where liquor is sold was void, as constituting an unnecessary interference with personal liberty. The statute in the case at bar, in effect prohibits the watchman, the inn-keeper and the other employees from leaving the burning premises until after all guests and inmates are notified and saved. This is an unnecessary interference with personal liberty, and it is not a well recognized means of promoting public safety to require individuals to remain in a burning building.

In *Hichinger vs. City of Maysville*, —— Ky. ——, the court held that a law prohibiting any person from associating with a prostitute was void because it was illegal to prevent persons from conversing with prostitutes upon necessary and legitimate business.

Once more we wish to impress upon the court the fact that a burning building and fire always mean danger. The statute by its express words applies only to buildings more than four stories high and having more than 50 rooms. After a fire has broken out it would take some time to perform the statutory duties in a building of only four stories and having 50 rooms, but in the case at bar the building was five stories high and had more than 200 rooms. In every case, therefore, the performance of the statutory duty is attended with danger to the life and liberty of persons upon whom the performance of those duties rests.

But the statute can not be upheld on the ground that it imposses the aforesaid duties only when the same can be performed without danger to the parties performing them, because such is not the language of the statute, nor is such the interpretation placed upon the statute by the Supreme Court. Moreover such an interpretation makes the statute too indefinite and uncertain, for the question

as to whether or not the duties could be safely performed is a question of opinion pure and simple. We are, therefore, confronted squarely with the question that Rome Miller is deprived of his property because the watchman or Rome Miller, or some other employee, failed to perform the duties imposed by statute, and the performance of which duties was attended with danger to the life and liberty of such party. As we have said before, to have complied with the statute required that some person should go not only to Strahl's room, but to all the rooms in the hotel, and this meant that such person must run more or less risk of losing his life, must necessarily run as great risk as Strahl, or any other guest of the hotel ran, for it would require such person to place himself in identically the same position of danger as was occupied by Strahl and the other guests. As the result of the smoke two persons were suffocated in this fire and many other persons received greater or less injuries from the smoke and the fire. We insist that no law can compel persons to go into or remain in a burning building. To deprive a party of the privilege of at once leaving a burning building deprives such person of his life and liberty. Fire is a common enemy of all, and when fire occurs each person must look to his own safety.

The guest of a hotel runs no greater risk from fire than does the inn-keeper. Both are under the same roof, both run the same risk and both have the same constitutional right to look out for their own life when fire occurs. Public safety is not and can not be advanced by compelling the inn-keeper or watchman to risk his life for the purpose of saving the life of another. Once more we wish to impress upon the court our position in reference to this statute. We admit that it is plainly within the power of the state to require the installation of fire gongs,

to require that the hotel be provided with any number of stairways, fire escapes, or to require the installation of any apparatus which could be used for the purpose of warning guests. No complaint is made about the provision of the statute requiring fire gongs, but we do complain of those provisions of the statute which placed upon the watchman, the inn-keeper and the other employes, the duty of awakening Strahl or notifying him of the fire and of doing all in their power to save him.

At the time of the oral argument in this case, we shall have further authorities to submit to the court upon this question, but what we have already said should be sufficient to demonstrate that the question raised by the writ of error is not so frivolous that the court will sustain the motion of defendant in error.

Respectfully submitted,

EDGAR M. MORSMAN, JR.,

Attorney for Rome Miller, Plaintiff in Error.

In the Supreme Court of the United States

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

Number 971

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

EDGAR M. MORSMAN, JR.,
Attorney for Rome Miller.

TO SAID COURT:

Rome Miller has prosecuted a writ of error to this court, complaining that a certain judgment for $6,500.00, interest and costs, rendered against him by the District Court of Douglas County, Nebraska, and affirmed by the Supreme Court of that State, deprives him (Miller) of his property without due process of law, and denies to him the equal protection of the law, both of which are guaranteed by the 14th amendment to the Constitution

of the United States. The facts of this controversy as disclosed by the record, and so far as they are pertinent to the questions raised, are as follows:

STATEMENT.

Rome Miller was the proprietor and owner of the Millard Hotel, located at the corner of 13th and Douglas Streets in the City of Omaha. On the morning of the 23rd of January, near three o'clock, a fire broke out in this hotel, but the origin of this fire and its cause were never discovered. Neither the proprietor nor any of his employees or servants were in any manner responsible for, nor did they cause the breaking out of the fire and, as stated, its origin and cause were never ascertained.

The Millard Hotel is a brick building, five stories high and at the time of its construction was the finest hotel between the Mississippi River and the Rocky Mountains. It has some 200 guest rooms but the building is not fire proof, for it was constructed long prior to the day of fire proof buildings. On the outside of the building there are six metallic fire escapes, running from the ground to the top floor. In every hallway are placed red electric lights and on the walls were printed notices showing the location of and the way to these outside fire escapes. There is one passenger elevator in the hotel, and from the office to the top floor run two stairways to be used by the guests and there is an additional stairway at the rear in the servant's quarters. Each guest room in the hotel was provided with an automatic rope fire escape, and on each floor ~~was~~ used located two large fire gongs, operated by an electric current controlled by a switch placed behind the clerk's desk in the office. In addition to the foregoing fire protection and precautions taken for the safety of guests, fire hose and chemical fire

extinguishers were kept in appropriate places on each floor of the building. There was a telephone system throughout the hotel, the switch board being located in the office behind the clerk's desk on the first floor. There was also an A. D. T. fire alarm system and the boxes constituting this system were located in the basement and on every floor of the building. It was the duty of the night watchman to make the round of these boxes every hour during the night, and in making such rounds he was compelled to go through all the hallways from the basement to the top floor. At each box the watchman would stop, turn the indicator on the box and this registered at the A. D. T. office the fact that the watchman was on duty and had made his entire round each hour. The A. D. T. record showed that the watchman made his round at 2:30 a. m. but that the line was out of order at 3:30 a. m. at which time the fire was in progress.

On the night of the fire the defendant in error, Emil J. Strahl, was occupying a room on the top floor, or fifth story of the building. Being awakened he testified that he dressed, put on all his clothes, even his gloves; that while dressing he repeatedly tried to telephone the office, but could obtain no response; that the hall was full of smoke; that after he had dressed he carefully made his way down the hall to the elevator, and there called repeatedly for the elevator, but some one hollered from below that the elevator was not running and for him to take the stairs; that not knowing where the stairway was located, he made his way back to his room, being nearly overcome by the smoke; that he then again telephoned the office, but received no response; that next he threw the automatic rope fire escape out of the window, but the automatic part failed to work and

so he attempted to go down hand over hand. He slid too fast, fell and broke his leg.

The fire did but little damage to the building though there was considerable smoke, for the fire was what the firemen term a concealed one. Strahl was not burnt, though he claims some damage to his lungs on account of inhaling the smoke. He was injured not by the fire, but by the accident suffered while he was making his way from the burning building.

Rome Miller, plaintiff in error and proprietor of the hotel, was not present at the time of the fire, being then in California. Mr. Clark, the manager of the hotel at the time of the fire was asleep in a suite of rooms on the third floor, and which rooms were occupied at the time by himself, his wife and two babies. He was notified of the fire by the bell boy, who operated the switch board in the office. He at once stepped out of his room into the hall, smelled smoke; went back into his room roused his wife and children; put on his trousers; took his wife and children down the stairway to the lobby of the hotel where he found the bell boy behind the counter at the telephone switch board ringing the rooms as fast as he could. Mr. Clark instructed the bell boy to continue ringing these rooms, and he then went to the basement, told the engineer to remain at his post so as to keep the lights going, for the hotel furnished its own electricity. Then Mr. Clark went about the hotel kicking on the doors of the rooms and notifying the guests of the existence of the fire.

The bell boy, a colored lad named Roy Brotherington, was the only bell boy on duty at the time of the fire. It was the duty of Brotherington to answer calls at the telephone switch board and to run the elevator when some guest arrived late in the evening, for the elevator was supposed to be shut down at 1 a. m. When Brother-

ington learned of the fire he at once notified Mr. Clark, the manager, also notified Mr. Vail, the day clerk, and then as fast as he could, rang the various rooms by telephone. In response to a call for the elevator he, together with a police officer, tried to operate the elevator, but the elevator shaft was so full of smoke that the police officer forbade the running of the elevator and closed it.

The night watchman, on the night of the fire, made his rounds of the A. D. T. boxes as usual and when he discovered the fire he at once turned in a fire alarm to the A. D. T. office, then as soon he could, he made his way to the various rooms in the hotel kicking on the doors and notifying the guests of the fire.

Both the fire and the police departments arrived upon the scene almost immediately after the fire was discovered, and the firemen and policemen were all over the building assisting guests in making their escape and notifying them of the danger.

Mr. Vail, the day clerk of the hotel, occupied a room adjoining the one assigned to Strahl. Being notified of the fire over the telephone, he made his way down to the office with his wife, and then went about the hotel notifying guests and inmates thereof of the fire. The night clerk was in the office at the time the fire broke out, but the evidence failed to show what assistance he rendered in helping to notify guests of the fire. Possibly he took to his heels and ran no risks. Some persons cannot help being cowards and no person can at all times and under all circumstances be a hero. The engineer and fireman were on duty in the basement and remained at their post during the entire time of the fire, in accordance with the instructions given them by the manager, Mr. Clark.

(The foregoing facts are substantially established by the pleadings and by the evidence found on pages 16 to 23 of the printed record, and which evidence was included in the assignments of error made in the Supreme Court of the State of Nebraska, pursuant to paragraph 1 of Rule 12 of that Court.)

Emil J. Strahl claiming that Rome Miller was negligent in not saving him unhurt and uninjured from the fire commenced suit to recover damages, and the jury fixed the amount of his recovery at $6,500.00.

The amended petition (printed record, pp. 1 to 4), set forth a cause of action based upon alleged violation of the common law duty owed to Strahl by Miller, and likewise based upon alleged violation of the statutory duties, which were due from an innkeeper to his guest. These statutory duties arise out of a law passed by the Nebraska legislature in 1883. Subsequently the first four sections of this act were repealed leaving in force at the time of the fire the following part of the original act, and which is now known as Sections 3104 to 3108 inclusive of the Revised Statutes of Nebraska for 1913:

"SECTION 3104. WHEN MUST EMPLOY WATCHMAN—AWAKEN GUESTS. In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

"SECTION 3105. SAME—PENALTY. Every proprietor of such hotel or lodging house who shall fail to comply with the requirements of the next preceding section shall be deemed guilty of a misdemeanor, and

upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars."

"SECTION 3106. WATCHMAN GUILTY OF MISDEMEANOR. Should such watchman leave his post of duty in such hotel or lodging house for more than fifteen minutes at any one time during the hours specified for him to be on watch, or if he shall sleep while on duty, or if he shall fail to awaken the persons sleeping in such hotel or lodging house, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars nor more than five hundred dollars."

"SECTION 3107. WHEN TWO STAIRWAYS ARE REQUIRED. All hotels or lodging houses over two stories in height and over one hundred feet in length shall be constructed so that there shall be at least two stairways for the use of the guests leading from the ground floor to the uppermost story. And all outer doors shall be so hung that they shall open on the outside instead of the inside of such hotel."

"SECTION 3108. GRAND JURY. The four next preceding sections shall be given in charge to the grand jury at each session. And they shall make due inquiry and indict and bring to trial all parties found guilty of violating any of its provisions."

The plaintiff in error in this court, Rome Miller, makes no complaint of the duties placed upon him by this statute in so far as it required him to furnish and equip his hotel with facilities whereby guests could escape in the event there was a fire, nor does he complain of the duties placed upon him by the statute in so far as it might require him to take precautions against fire. Furthermore, Rome Miller makes no complaint in this court of any liability placed upon him by statute or by common law for damages done by a fire, the origin and cause of which might be due to his fault or to that of

his employees. But on the other hand, Rome Miller does complain of the liability placed upon him by the statute in question in so far as it imposes upon him and upon his employees the duty to save the guests of the hotel unharmed from a fire, for which he and his employees are in no manner responsible.

Section 3104, above set forth, requires that the proprietor shall employ and keep at least one competent watchman, whose duty it shall be *"To give warning in case a fire should break out" and who "in case of fire shall instantly awaken each guest and all other persons therein and inform them of such fire."* This section further provides that *"it shall be the duty of every proprietor or keeper of such hotel or lodging house, in case of fire therein, to give notice of the same to all guests and inmates thereof at once, and to do all in their power to save such guests and inmates."* The statute in question provides for fine and imprisonment of the watchman and inn-keeper for a violation of its provisions, and the Supreme Court of Nebraska has affirmed the view taken by the trial court, to-wit, that the violation of the statute confers upon the guest a civil cause of action against the inn-keeper.

This cause was tried to a jury in the District Court of Douglas County, and the instructions of the trial court will be found in the printed record on pp. 7 to 15 inclusive. Among other things, the amended petition averred that on the morning of January 23rd, *"a hostile fire started and broke out in said hotel"* and that owing to the negligence of Rome Miller, it was not promptly discovered, located or controlled; *"that defendant and each and all of his employees and servants in that behalf, negligently failed to awaken or give plaintiff notice of said fire, or to do all in their power to save plaintiff;"* that defendant and his servants failed to arrest the progress

of the fire; *"that defendant was negligent in that he nor his night watchman, nor any of his servants did not awaken or arouse plaintiff or notify him of said fire, nor did any of them do all in their power or anything to awaken or save plaintiff."*

Basing its instructions upon these averments of the amended petition, the trial court told the jury that the statute quoted above imposed upon Rome Miller as proprietor of the hotel, certain duties and that Rome Miller's absence in California at the time of the fire did not relieve him of these duties, and that he would be liable in the event his employees and servants failed at the time of the fire to fully perform the duties in question.

By Instruction 2 (printed record, page 9), the trial court told the jury that the statute required the watchman "to give warning in case a fire should break out to all guests and persons" in the hotel, and in case of fire "to do all in their power to save the guests and inmates." By Instruction 2½ (printed record page 10) the trial court told the jury that failure to perform these statutory duties constituted negligence, and by Instruction 6 (printed record page 11), the court informed the jury that the failure to awaken Strahl and notify him of the fire constituted negligence. By Instruction 8 (printed record page 12), the trial court instructed the jury that if the watchman failed to awaken Strahl and inform him of the fire, the defendant would be liable. According to Instruction 9, (printed record page 12), the jury were told that if the plaintiff's safety required the operation of the elevator during the course of the fire, the defendant was liable for failure to operate it. Instruction 10, (printed record page 13), informed the jury that the absence of Rome Miller from the hotel on the night of the fire did not relieve him of the duty placed upon him by statute, and

that in such event it was his duty to see that his servants and employees performed each and every one of the duties prescribed by the statute. Instructions 11 and 12, (printed record page 13), told the jury that it was the duty of Rome Miller to give to Strahl notice of the fire, and to do all in his (Miller's) power to save Strahl, from injury by reason of such fire, and that failing to do so, either through himself or through his servants, Rome Miller would be liable to Strahl for damages.

Under the instructions of the court the jury were permitted to return a verdict in favor of Strahl and against Miller if, in their opinion, Miller, the night watchman, the manager, the night clerk, the bell boy or any other employee, failed to awaken and notify Strahl of the fire, failed to operate the elevator or failed to do all in their power to save Strahl.

On appeal to the Supreme Court of Nebraska, Rome Miller sought a reversal of the judgment of the District Court upon the ground (among others) that permitting the jury to assess damages against him for the reason that after the fire had broken out, he or some of his employees, had failed to awaken and notify Strahl of the fire, had failed to operate the elevator, had failed to do all in their power to save Strahl, violated the 14th amendment to the Federal Constitution and deprived Rome Miller of his life, liberty and property without due process of law, and denied to him the equal protection of the law. The manner in which this question was raised is shown by pages 16 to 23 and pages 41 to 42 of the printed record, which sets forth some of the assignments of errors made and argued in the Supreme Court of Nebraska.

The opinion of the Supreme Court of Nebraska is found on pages 24 to 27 of the printed record, and it

holds in the syllabus, likewise in the body of the opinion, that the statute in question does not contravene the Federal Constitution, but constitutes a proper exercise of the police power of the state. In other words, the Supreme Court of Nebraska held that the legislature, under its police power, has the right to force an inn-keeper and his employees, after fire is discovered in the hotel, and which fire is not caused by nor due to the negligence of the inn-keeper of his employees, to operate the elevator, also to awaken and notify all guests of the fire, also to do all in their power to save such guests unharmed from the fire, and that failing to perform any or all of these acts, the inn-keeper is to be liable to a fine and imprisonment and should likewise respond in damages in a civil cause of action brought by the guest.

QUESTIONS RAISED BY THE RECORD.

The record in this case presents but one question, to-wit: the constitutionality of the Nebraska statute as applied to this case and whereby Rome Miller is deprived of his property because, in the subsequently formed opinion of the jury, he (Miller) and his servants, after the fire broke out, and for which fire they were in no manner responsible, failed to awaken and notify Strahl concerning the fire, failed to operate the elevator, which was shut down by order of the police on account of the danger connected therewith, and failed to do all in their power to save Strahl.

SPECIFICATIONS OF ERROR.

1. The trial court erred in charging the jury that the statute placed upon Rome Miller and his employees

the duty of doing all in their power to save Strahl unharmed from the fire, and that failure to perform this duty would make Rome Miller liable in damages. The Supreme Court of Nebraska erred in sustaining such interpretation so placed upon the statute by the trial court, for the reason that such interpretation makes the statute contravene the 14th amendment to the federal constitution, in that it denies to Rome Miller the equal protection of the law and deprives him of his life, liberty and property without due process of law.

2. The statute in question is unconstitutional for the reason that it is class legislation and denies to Rome Miller the equal protection of the laws guaranteed by the federal constitution. The statute applies only to inns having more than fifty guest rooms. The trial court erred in charging the jury that the statute placed upon Rome Miller certain duties and the Supreme Court of Nebraska erred in holding that the statute in question does not violate the rights guaranteed to Rome Miller by the 14th amendment to the Constitution of the United States.

3. The trial court erred in charging the jury that the statute placed upon Rome Miller and upon his servants, and also upon the watchman, the duty to awaken Strahl and notify him of the fire, and that failure so to do would make Rome Miller liable in damages. The Supreme Court of Nebraska erred in sustaining such interpretation so placed upon the statute, for the reason that such interpretation deprives Rome Miller of life, liberty and property without due process of law, and denies to him the equal protection of the law, which is guaranteed by the 14th amendment to the federal constitution.

4. The statute contravenes the 14th amendment to the Constitution of the United States in that it deprives one of his life, liberty and property without due process of law, and denies to a citizen the equal protection of the law.

5. Compelling Rome Miller to respond in damages in this case deprives him of life, liberty and property without due process of law, and denies to him that equal protection of the laws guaranted by the federal constitution.

6. The judgment rendered against Rome Miller in the District Court of Douglas County, and affirmed by the Supreme Court of Nebraska, deprives him of his life, liberty and property without due process of law, and denies to him the equal protection of the law, all of which is guaranteed to him by the 14th amendment to the Constitution of the United States.

BRIEF.

POINT ONE. We feel that the verdict of the jury and the affirmance of the judgment by the Supreme Court of Nebraska, stopped very little short of robbery, but we realize that the Supreme Court of the United States has no power to review the decision of the Supreme Court of Nebraska, excepting on the one ground, to-wit: as to whether or not the Nebraska Act of 1883, as interpreted and applied to the trial of this case, is contrary to the provisions of the 14th amendment to the Constitution of the United States. Having this proposition clearly in our minds, and intending to present no other questions to this court, we desire at the outset to have this court clearly understand the objections which we make to the statute and the grounds upon which we claim that it is unconstitutional.

We make no claim that under the police power the

legislature cannot regulate inns and inn-keepers. We admit the existence of this power, and for the purposes of this case, we are willing to admit that the state of Nebraska without limit, may prescribe rules and regulations governing the construction of inns, the providing of fire escapes, the number of stairways, gongs, etc., for such rules and regulations have reference to the performance of acts and the taking of precautions prior to the time when fire breaks out. But after the fire breaks out we deny that the legislature, under its police power, can compel the inn-keeper or the watchman, or any other employee, to do any act which involves a risk to the life and liberty of such person. We might go further and admit that the legislature can make an inn-keeper responsible if he permits a fire to break out in the inn. In other words, the legislature may make the inn-keeper an insurer, though the Supreme Court in its opinion expressly denies that the statute in question has any such effect. But where a fire breaks out through negligence of the inn-keeper, the liability must be based upon the ground of such negligence, and if no liability exists on that ground, the legislature can not create a liability for failure of the inn-keeper and his employees to risk their lives and safety in order to save the guests unharmed. Frequently fires occur which the inn-keeper is powerless to prevent, and we deny the right of the legislature to require of the inn-keeper and his servants that they shall risk their lives to save the lives of their guests. We will admit the right of the legislature to require the inn-keeper to employ a watchman, or to require that a certain number of employees be on duty during the night, for the presence of a watchman and such other employees about the premises tends to prevent fires, and to bring about an early discovery thereof. But we deny that the legislature can compel such watch-

man or other employees, to remain in the burning building for the purpose of doing all in their power to save the lives of the guests and for the purpose of awakening the guests and notifying them of the fire.

Our objection to the statute of 1883 is directed solely towards those provisions thereof, and the interpretation given thereto, which require of the inn-keeper and of his employees, the performance of acts after the fire has broken out, and which acts, to a greater or less extent, must endanger their safety and liberty. The police power of the state does not permit the legislature to pass a law compelling a man to perform acts which endanger his life and safety and in default thereof make him liable to fine, imprisonment and damages. The life of the inn-keeper, the life of the watchman, and the lives of the employees, are just as precious and valuable to the state as is the life of the guest.

Point Two. The statute requiring the inn-keeper in the event fire breaks out, to do all in his power to save the guests and failing so to do making him liable to fine, imprisonment and to the payment of damages, is so indefinite that it fails to prescribe any fixed rule of conduct and, therefore, is lacking in due process of law. The statute in the case at bar was interpreted and applied as requiring not only that Rome Miller but that his employees at the hotel should do all in their power to save Strahl. To do all in one's power fails to inform a man of ordinary intelligence what he must or must not do under given circumstances. A jury at a later date and not the statute, are to determine what course of conduct is prescribed, and what acts are prohibited by the statute. The so-called calm deliberate decision of the jury reached in the jury room and not in the presence of a great conflagration, decides what the statute means and settles what the inn-keeper should have done. It is

impossible for any defendant to place before the jury the exact situation in which such defendant and his employees find themselves during the course of the fire. Fire is the common enemy of all mankind, and in presence of such danger no two men act alike. At the time each person thinks and believes he has done everything possible, such even is the thought of the man who takes to his heels. Men are differently constituted; some are abject cowards, a few only are real heroes; some peoples brain works rapidly and normally in face of danger, whereas other people lose all control over their actions. Requiring a person to do all in his power to save another fails to point out to such person with sufficient clearness the course of conduct to be pursued and furnishes no criterion whereby such person can judge his acts. Therefore fine, imprisonment and payment of damages for failure to do all in one's power to save another deprives a person of liberty and property without that due process of law guaranteed by the constitution of the United States.

Collins vs. Kentucky, 234 U. S. 634.

International Harvester Co. vs. Kentucky, 234 U. S. 216.

State vs. Mann, 2 Ore. 238.

Cook vs. State, 26 Ind. App. 278.

U. S. vs. Capital Traction Co., 34 App. D. C. 592.

Brown vs. State, 137 Wis. 543; 119 N. W. 338.

Tozer vs. U. S., 52 Fed. 917.

R. R. Com. vs. Grand Trunk, —— —— ——; 100 N. E. 852.

U. S. vs. Reese, 92 U. S. 214.

American School vs. McAnnulty, 187 U. S. 94.

Czarra vs. Board of Medical Sup., 25 App. D. C. 443.

C. M. St. P. Ry. vs. Polt, 232 U. S. 165.

POINT THREE. The watchman and all other employees failed to awaken Strahl and notify him of the fire, but left him to escape as best he could. The statute requires the watchman and the inn-keeper to awaken guests and notify them of the fire. The inn-keeper in this case (Rome Miller) was in California at the time of the fire, and so the court interpreted the statute as requiring the inn-keeper to have this duty performed by some employee. Strahl occupied a room on the top floor of the building where the halls were full of smoke. To awaken Strahl and notify him of the fire required that some employee must go to Strahl's room, must pass through the halls which were full of smoke. Going to Strahl's room would place such person in the same position of danger as Strahl was in and if Strahl was in danger, the statute requires the performance of acts which will endanger two lives instead of one. Fire is a terrible thing, and always creates panic. The employees in the hotel have as good a right to save their lives as has the guest. No person can tell when it is safe to enter into or remain in a burning building. The employees might have made their way to Strahl's room in safety and then have been overcome by smoke, or learn that the fire had cut off their means of escape. It is not for the jury to say afterwards whether or not the act could have been safely performed, for the employees at the time had the right to take to their heels and save themselves if they so desired.

A master must furnish his employee a safe place in which to work and failing so to do must respond in damages. But having furnished a safe place the master cannot be made liable because he fails to risk his own safety to save the servant. An inn-keeper may be made responsible for damage done by fire, but not being made responsible therefore he cannot be held liable because

he fails to risk his own safety in order to save his guest unharmed.

L. & N. R. R. C. vs. Com., 99 Ky. 132.
Jacobsen vs. Mass., 197 U. S. 11.
Munn vs. Illinois, 94 U. S. 113.
Gastenau vs. Ky., 108 K. 473.
Coppage vs. Kansas, 236 U. S. 1.

POINT FOUR. Fire is the common enemy of all mankind. Each year it destroys millions of dollars worth of property, and takes the lives of hundreds of people. Owing to the proximity of buildings in a city, danger from fire is terrible, and history reveals instances where whole towns have been destroyed by one conflagration. Rome was the first city which had an organized fire department, and through such means Crassus laid the foundation of his fortune. When fire broke out Crassus with his trained band, hastened to the scene, but they stood idly by watching the burning building until Crassus had purchased both the property being destroyed and that which was threatened with destruction. After a satisfactory purchase had been made Crassus issued his orders and his trained band soon extinguished the fire, and in each instance Crassus found himself possessed of considerable property purchased at a ridiculously low figure. In modern times all cities of any size maintain a paid fire department, whose duty it is not only to prevent and extinguish fires, but also to save persons whose life and safety are endangered by the fire. In smaller cities there is usually a volunteer fire department which takes the place of the paid fire department of the larger towns. While fighting fire and saving lives are some of the duties performed by the city government, still there is no legal obligation resting upon the city to furnish fire protection and the city can-

not be held liable for damages on account of failure to furnish the same. No law has ever been passed which made fire service compulsory. We are not claiming that the legislature could not pass a law which might make fire service compulsory, but we insist that any such law would have to be so drawn as to place the burden evenly upon all citizens. The statute of 1883 requires the inn-keeper, the watchman and the employees to risk their lives to save the guests unharmed. In case of fire it is impossible for one to do all in his power to save the lives of the inmates and guests of the hotel without running some risk to his own person. It is impossible to go to a guest's room and awaken him and notify him of the fire without running some risk to one's person, for if the guest needs aid or assistance, i. e., if the guest is in a position of danger, then the person going to the assistance of the guest places himself in the same position of danger.

To require that the inn-keeper, the watchman, or the employees should risk their safety for the purpose of aiding others in the hotel during a fire, denies to the inn-keeper, to the watchman, to the other employees the equal protection of the laws, for it places upon them the duty of performing fire service, and this burden, if it can be made compulsory, cannot be laid upon any one class of citizens, but must be placed equally upon all the citizens. No one class of men can be compelled to serve in the army. Military service may be required of the citizens, but it must fall impartially upon all men, and not alone upon the inn-keeper, the watchman or the employees of the inn-keeper.

Point Five. The statute by its express provisions, applies to keepers of hotels having more than fifty rooms. Size is no proper basis for imposing liability. Guests in a forty-nine room hotel are in as great need

of being saved from fire and of being notified of the existence of a fire as are the guests in a two hundred room hotel. Classification is not necessarily class legislation, but when the Police Power is called upon to justify the application of a statute to only a part of a class (inns of more than fifty guest rooms), there must be some real justification therefor. Requiring that the keepers of inns having more than fifty rooms shall awaken and notify the guests of fire and to save them unharmed from fire, denies the equal protection of the laws to such inn-keepers as compared with the keepers of inns having less than fifty rooms.

a. St S. F Ry on boarding — U S — decided 6-1-15

ARGUMENT.

I.

The question which we have presented to the Court seems to the writer to be so simple and plain that a mere statement thereof is the greatest argument which we can make in its favor, and we find some difficulty in adding anything to the statement and argument set forth in our brief, filed herein opposing the motion of defendant in error to dismiss. It is true that this case involves only $6,500.00, interest and costs. However, other cases are pending in the lower courts awaiting the decision of this tribunal upon the constitutionality of this statute and this case is of great importance because it raises questions invloving constitutional rights, and when principle is at stake the amount of money involved should have no influence upon the decision. Rome Miller has had a judgment rendered against him in a suit wherein the trial court told the jury that the Act of 1883 placed upon him as the proprietor of an inn containing

more than fifty rooms, the duty of awakening Strahl and notifying him of the fire, and of doing all in his power to save Strahl. The trial court made no effort to tell the jury what lay in the power of Miller or his employees to do to save Strahl unharmed, but permitted the jury to say what Miller and his employees might have done. Miller to avoid fine, imprisonment and damage, was compelled to guess what the law meant by requiring him to do all in his power to save Strahl, in fact Miller was compelled to guess what the jury would guess that the law required of him and Miller's guess must be made in the presence of danger, whereas the guess of the jury is made months afterwards and calmly and deliberately in a fire proof building. The guess or decision of the jury made long after the fire occurs writes into the law the meaning of the phrase, "do all in their power to save guests and inmates thereof." Under identically the same testimony different juries would give different meanings to this phrase. No two men can have the same opinion upon such a question. The Supreme Court of Nebraska in its opinion, fails to point out what this phrase means, and surely if the court cannot tell us what the law means, it is too indefinite to prescribe a rule of conduct for reasonable men to follow. Let each member of this tribunal write down on paper what they think the inn-keeper must do in order to bring himself within the meaning of the law requiring him and his employees in case of fire to do all in their power to save guests and if any two of this court agree in what they have written, then the writer of this brief will admit, that the law is sufficiently definite to prescribe a fixed rule of conduct.

At various times during this litigation, the other side have answered our argument by saying that the rule of reason should be applied, and that the inn-keeper must do all he reasonably can to save his guests. We

note with some satisfaction, that the Supreme Court of Nebraska makes no such statement in its opinion. But to say that one must do all he reasonably can to save another, is just as indefinite as to say one must do all in his power to save another. No two minds operate alike in presence of danger. Fires are not so common that we all have had experience therewith and know how to act. The jury were furnished no criterion by which to judge Miller's acts, and worst of all he had no criterion by which to know what the reasonable minds of the jury would say constituted his duty.

The statute is a criminal one, and as interpreted by the court, gives a civil cause of action for damages. It has at times been claimed by the other side that the statute is void as to the criminal liability, but valid as to the civil liability. The 14th amendment to the constitution protects property as well as life and liberty, and a statute prescribing such an indefinite rule of conduct that no man knows its meaning, is just as void as to the civil liability as to the criminal liability.

Under this statute every inn-keeper is, in case of fire, and in the presence of danger, required to guess what twelve jurors will afterwards decide should have been his course of conduct in order to have complied with the statute requiring him to do all in his power to save guests unharmed from the fire. The authorities all hold that such a statute is so indefinite as to be lacking in that due process of law required by the Federal Constitution. Let us briefly examine some of the decision on this point.

In the case of *International Harvester Company vs. Kentucky,* 234 U. S. 216, and *Collins vs. Kentucky,* 234 U. S. 634, this identical question was before the court. In those cases the statute of Kentucky was held to deprive a person of life, liberty and property without due

process of law because it required him at his peril, to ascertain and know what the *real or market value* of an article was under certain assumed circumstances. In the *Harvester case,* Mr. Justice Hughes, speaking for the Court says:

> "The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be "the market value under fair competition, and under normal market conditions." 147 Ky. 566. *Com. vs. National Harvester Co.,* 131 Ky. 551, 576, 133 Am. St. Rep. 256, 115 S. W. 703; *International Harvester Co. v. Com.,* 137 Ky. 668, 577, 678, 126 S. W. 352. We have to consider whether, in application, this is more than an illusory form of words, when, nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from 10 to 15 per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent and labor 27½ per cent. Whatever doubt there may be about the exact figures, we hardly suppose the fact of a rise to be denied. But, in order to reach what is called the real value,—a price from which all effects of the combination are to be eliminated,—the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.
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> "This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or

> trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

It is not constitutional for the legislature to prescribe one rule of conduct for one inn-keeper and a greater or less requirement for another inn-keeper. "To do all in their power to save guests" must mean a certain fixed rule of conduct, and we insist that the inn-keeper has no means of knowing what is required of him and his employees under the circumstances. Bear in mind that we are not dealing with precautions required

of the inn-keeper prior to the fire; nor with acts required of him to prevent fires, but we are dealing with the duties to be performed while the fire is raging, when the hotel is full of smoke and at a time when two men lost their lives and many were injured. It is far easier to guess what would be the value of the tobacco crop under certain circumstances than to ascertain and know before hand what lies in one's power to do to save people from a burning building. Every day tobacco growers are trying to figure out what is to be the value of tobacco under certain conditions. But fires are not of such common occurrence that people generally know what should or should not, what can or cannot be done to save people from a burning building. Strahl would have been saved unharmed had he remained quietly in his own room, but he tried to escape and was injured in making his escape. Should the inn-keeper have known that the fire would not reach Strahl's room and have notified him of that fact and calmed his fears, or should the inn-keeper, at the risk of his life, have passed through the burning portion of the building in order to reach Strahl's room and fearing the fire would progress further, should he then have picked up Strahl and carried him out of the burning building? Can a person know before hand what the statute requires of him when it says that he must do all in his power to save his guests? At the time a person always thinks he acts for the best.

In *Collins vs. Kentucky,* 234 U. S. 634, Mr. Justice Hughes, speaking for the court, says that the Kentucky statute in its reference to real value prescribed no standard of conduct that it is possible to know; that it violated the fundamental principle of justice embraced in the comprehension of due process of law in compelling men, on peril of indictment, to guess what their goods would have brought under other conditions not established.

In *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, this court said that the treatment of disease by the influence of mind was a mere matter of opinion and, therefore, receiving money as pay for such treatment could not be held to be obtaining money by false pretense or promise. To do all in one's power to save another is purely a matter of opinion.

In *Brown vs. State,* 137 Wis. 543; 119 N. W. 338, the Supreme Court of Wisconsin says that a law which takes away one's property and liberty as a penalty for an offense must so clearly define the acts on which the penalty is declared that no ordinary person can fail to understand his duty and the departure therefrom which the law condemns, since one can not be said to violate a statute which is so contradictory or blind that he must guess what his duty is thereunder.

In *Tozer vs. U. S.,* 52 Fed. 917, Justice Brewer stated that "in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury now thinks it reasonable or unreasonable. There must be some definiteness and certainty."

In *Czarra vs. Board of Medical Supervision,* 25 App. Dist. of Columbia, 443, the court held that the act of Congress conferring upon the Board of Medical Supervisors the right to revoke the license of a medical practitioner for "unprofessional or dishonorable conduct" was unconstitutional and void on account of the indefiniteness and uncertainty, as unprofessional and dishonorable were not defined by the common law, and what conduct might be embraced within the meaning of those words was a matter of opinion only.

In *U. S. vs. Capital Traction Company,* 34 App. Dist. of Columbia, 592, the act of Congress requiring the

Traction Company to operate and run a sufficient number of cars to accommodate persons, was held void for uncertainty and indefiniteness. The court stated that what constituted a sufficient number of cars was a mere matter of opinion.

In *L. & N. R. R. Co. vs. Com.*, 99 Ky. 132, the Supreme Court of Kentucky held unconstitutional the act which provided that a railroad company should not charge more than a reasonable or just fare, stating that the statute leaves uncertain what shall be deemed a just or reasonable fare, and different juries might reach different conclusions on the same testimony, for the violation of the statute depends upon the jury's opinion as to the meaning of the words "just and reasonable."

In *Hewitt vs. State Board*, 148 California 590, the statute making a physician's certificate liable to cancellation for professional misconduct if the physician issued "advertising matter containing grossly improbable statements" was held unconstitutional because what should constitute "grossly improbable statements" was merely a matter of opinion and prescribed no fixed rule of conduct to guide the physician and inform him before hand as to what acts were prohibited.

To do all in one's power to save guests is so indefinite and uncertain that it prescribes no fixed rule of conduct. The portion of the statute requiring the inn-keeper to do all in his power to save guests deprives the inn-keeper of life, liberty and property without due process of law. The trial court gave to the statute a still broader interpretation, for it permitted the jury to hold Rome Miller liable in damages if they thought that he or *any of his employees*, had failed to do all in their power to save the guests. It does not help matters to say that this is a case of negligence, and that all the statute requires is for the inn-keeper to use reasonable care to

save the guests, for such was not the charge given to the jury by the trial court, and such is not the interpretation placed upon the statute by the Supreme Court of the State of Nebraska. Moreover rescuing persons from fire and from burning buildings is not of such common occurrence that reasonable men have any common standard or criterion of action applicable thereto. The statute, and the interpretation placed thereon by the trial court, deprived Rome Miller of $6,500.00, interest and costs, because the jury thought that he, or some of his employees, had failed to do everything within their power to rescue Strahl.

In *C. M. & St. P. Ry. Co. vs. Polt,* 232 U. S. 165, Mr. Justice Holmes held the South Dakota statute unconstitutional because "the rudiments of fair play required by the 14th amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add 1 cent to the amount that was tendered." So in the case at bar, Rome Miller in order to do all in his power to save Strahl must guess what the jury, long afterwards and not in the presence of danger, would decide that he and his employees should have done to save Strahl, who was not injured by the fire, but by a fall received when making his escape from the burning building. Rome Miller's presence at the hotel at the time of the fire might have saved Strahl, but is Miller required to guess that the jury would say it was his duty to be at the hotel every night. Had the watchman gone direct to Strahl's room instead of kicking at the first doors he reached, he might have saved Strahl, but is Miller required to guess which guests need assistance and which do not, and instruct his employees to see that these guests are rescued. Had the elevator been operated Strahl could have descended by it, but the police forbade the operation of the elevator. Should

Miller have forseen this and should he have notified Strahl that if fire broke out the elevator would not be operated so that Strahl would inform himself of the location of the stairway. There were a thousand and one things which Miller and his employees might have done to save Strahl but they thought they were doing their best and they could not forsee what the jury would think were the essential things to be done to save Strahl. Hindsight is always better than foresight, but we hardly think it fair to require that Miller and his employees, in the face of danger, should be possessed of that hindsight and perfect judgment shown by the jury when it says what they should have done to have saved Strahl, and we think it is for the legislature not for the jury to prescribe the rule of conduct to govern the action of an innkeeper and his employees.

II.

The jury were permitted to return a verdict for Strahl if, in their opinion Miller, the watchman or any other employee failed to do all in their power to save Strahl, failed to awaken Strahl and notify him of the fire. No limitations were placed upon these duties owed to Strahl. The night clerk seems to have looked after his own safety and took to his heels. The other employees stood at their posts and helped notify the guests, but they never reached Strahl's room. Smoke was thick in the halls and there was danger of suffocation to people going through the halls. The elevator shaft was full of smoke and the police forbade the operation of the elevator. To go to Strahl's room and awaken him would place the person performing such act in the same position of danger as was Strahl. Remaining in the building for a moment after fire breaks out involves some risk

to one's safety. We contend that in case of fire every person, inn-keeper, watchman, bell boy and employees have the constitutional right to look after their own safety and cannot be compelled under penalty of fine, imprisonment and payment of damages, to look out for the safety of other people. The police power can compel the inn-keeper to take precautions against fire, to furnish fire escapes and to construct fire proof buildings. Any precaution possible prior to the time fire breaks out can be required of the inn-keeper, and failing to furnish the same he can be made liable, but when fire breaks out or is threatening, every person has the right to look after his own safety. Each man is the sole judge of whether or not he shall run the slightest risk for the benefit of another, and if he decides not to do so, we may call him a coward but we cannot fine him, imprison him or make him pay damages. We insist that the life of the inn-keeper, the life of the employee is as sacred and as valuable to the State as is the life of the guest, and when fire occurs we claim that the inn-keeper, the watchman, the employees have the right to take care of themselves and they cannot be compelled to do all in their power or anything to save the guests unharmed from fire, nor can they be compelled to remain upon the premises and awaken guests and notify them of the fire. If they choose they can devote their entire time to saving their personal effects. Self preservation is the first law of nature and the government cannot deprive the individaul of this right.

We concede that fire is a public enemy and possibly a law could be passed compelling citizens to perform fire service, serve as fireman, etc., but such a law must place its burden equally upon all citizens and this is not the intent nor purpose of the statute under consideration.

Our proposition is that the inn-keeper, the watch-

man and the employees have the right, in case of fire, to look after their own safety and placing upon them duties to be performed after the fire occurs, and failing so to do making them liable to fine, imprisonment and damages, constitutes a taking of life, liberty and property without due process of law.

We think the exact question now being argued has never been passed upon by this court, but we know of no law which was in effect in the colonies or in England at the time of the adoption of the federal constitution, or prior thereto, and which law compelled individuals to risk their lives for the benefit of another individual or compelled individuals to perform duties after fire had broken out, and thereby deprived such individuals of the absolute right to take to their heels in face of danger and save themselves.

The exercise of the police power of the state is based upon the maxim *"sic utere ut alienum non laedas"* and, therefore, all regulations or rules requiring of the inn-keeper precautions against fire are valid. But fire may originate next door and may communicate to the hotel through no fault of the inn-keeper. Some guest may start the fire. When a fire for which the inn-keeper is not responsible has started, the inn-keeper is not using his property in a manner that injures others, for some outside force or power is destroying the hotel.

In *Munn vs. Illinois,* 94 U. S. 113, Justice Field in speaking of the words life and liberty as used in the 14th amendment to the constitution, says that life means something more than mere animal existence; that the inhibition of the 14th amendment against the deprivation of life extends to all those limbs and faculties by which life is enjoyed; that the provision prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other

organ of the body through which the soul communicates with the outer world. He further says that liberty means something more than mere freedom from physical restraint or the bounds of a prison, and means freedom to go where one may choose and to act in such a manner not inconsistent with the legal rights of others.

The Act of 1883 by requiring that the inn-keeper, the watchman and other employees do all in their power to save guests and by requiring that they awaken Strahl and notify him of the fire, denies to such persons the freedom to go where they choose, denies to such persons the privilege of being a coward if they so desire, and denies to them the right to take to their heels and save their own lives when danger arises but, on the other hand, it compels such person to risk the loss of a leg, arm, eye and other organs of the body and even their lives. It has been strenuously argued that sterilization laws are unconstitutional under the 14th amendment, but those laws deprive obnoxious criminals of their complete existence. The act of 1883 goes much further, for the inn-keeper, the watchman and the employees in the hotel are not criminals nor does their continued existence constitutes a menace to society, so that the legislature would have the right to curtail their life and liberty.

In *Jacobsen vs. Mass.*, 197 U. S. 11, by a divided court, the Massachusetts compulsory vaccination law was upheld, but the majority opinion clearly and plainly states that the law could not be enforced in cases where it was shown that the vaccination of a person would be detrimental to his health. The statute is upheld because the common consensus of opinion is to the effect that vaccination is harmless and constitutes a preventative of small-pox. The duties required of the inn-keeper by the Act of 1883 and of which we complain, do not prevent nor tend to prevent fires, for they are duties re-

quired of him after the fire breaks out. It is true that the duties in question if performed would tend to save the guests, but they imperil the safety of the persons performing these duties. If vaccination was sure to kill one person in every ten, we doubt if compulsory vaccination would be constitutional, though it might save two or three lives out of every ten.

In *Coppage vs. Kansas,* 236 U. S. 1, it was held by this court that the police power of the state could not be used for the purpose of favoring or compelling the employment of union labor.

Rome Miller, the proprietor of the hotel, was in California at the time of the fire, but the court instructed the jury that this did not relieve him from the performance of the duties imposed by the statute. In other words, the statute makes it imperative upon the inn-keeper, either in person or through some employee, to awaken the guests in case of fire, to notify them thereof and to do all in their power to save the guests unharmed from the fire. Once more let us repeat that we do not deny the right of the legislature to compel inn-keepers to take precautions against fire and to provide for the safety of the guests, but we deny the right of the legislature under the police power, to compel a person to risk his life for the purpose of saving another, and such risk is placed upon the inn-keeper, the watchman and all other employees by this statute. We insist that every man has the right to be a coward and we contend that the statutes will not turn cowards into heroes. In the face of danger from fire every person has the right to look to his own safety and cannot be charged with the duty of saving others.

III.

Compulsory service in fighting fires or rescuing in-

mates from a burning building cannot be placed upon any one class of citizens, without denying to them the equal protection of the laws. Compulsory service in the army and navy may be enforced providing the burden falls upon all citizens equally, though in times of peace it may be questionable if such compulsory service can be demanded. Compelling the inn-keeper and watchman to risk their lives in the face of danger from fire places upon them a burden not borne by the other citizens and deprives them of the equal protection of the law. Compulsory fire service to be constitutional must at least distribute its burden equally upon all citizens and not alone upon the inn-keeper, the watchman or the employes of the inn-keeper.

IV.

The statute is class legislation for other reasons. It is applicable only to hotels having more than fifty guest rooms. Fire is as dangerous to the guest in a forty-nine room hotel as it is to the guest in a fifty-one room hotel. The guest in one hotel is in as great need of being awakened or being notified of the fire or being saved from the fire, as is the guest in the other. There is no reasonable basis for such a classification, so far as leads to the duties and necessity of saving the guest or of notifying them of the fire.

We respectfully submit that the statute as interpreted and applied to this case deprives Rome Miller of life, liberty and property without due process of law, and denies to him the equal protection of the laws guaranteed by the 14th amendment.

Respectfully submitted,

EDGAR M. MORSMAN,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States

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In the Supreme Court of the United States

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

No. 971.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

EDGAR M. MORSMAN, JR.,
Attorney for Rome Miller.

TO SAID COURT:

An examination made of the brief filed herein by defendant in error shows that his counsel are so fearful as to the constitutionality of the Nebraska statute that they make no attempt to answer the argument advanced by us in our brief, but they endeavor to avoid that question by intimating to this Court that it is not raised by the record. Their claim is that at common law the innkeeper was liable to his guest for negligence, and that the Nebraska statute is, therefore, merely declaratory of the common law; that the petition, the instructions of the court, and the interpretation placed upon the statute by the Supreme Court, did not require of the innkeeper, or of his employees, that they run the slightest

risk to their person in the performance of the duties which it is claimed they owed to the defandant in error at the time of the fire. This claim made by defendant in error in his brief is not only a misstatement of the law, but is also a misstatement as to the averments of the petition, the effect of the instructions of the trial court, and the decision of the Supreme Court of Nebraska. We thought it unnecessary in our main brief to specifically point out every averment of the petition, every charge of the trial court, but it seems that the attorney for the other side has not carefully examined the record, for he did not try the case in the lower court, and we wish, therefore, to call this court's attention to the misstatements of law and fact contained in the brief filed by defendant in error.

There is no common law duty resting upon an innkeeper to protect his guest from fire. No court has ever held that such duty rested upon an inn-keeper, and one court, at least, has specifically held that there was no such duty imposed upon him.

Haire vs. Henderson, 43 Upp. Can. (Queen's Bench 571.

In *Clancey vs. Barker,* cited by the other side in support of their claim that the inn-keeper owes to his guest the duty to protect him from fire, the Supreme Court of the State of Nebraska merely held that the inn-keeper was liable for the negligent act of his employee. The court did not hold that at common law an inn-keeper owed any duty to his guest to protect him from fire, and that failure to perform such duty was negligence. Moreover, in *Clancey vs. Barker,* 66 C. C. A. 469, 131 Fed. 161, the Circuit Court of Appeals held that the inn-keeper was not liable for the very same act of the employee for which the Supreme Court of the State

of Nebraska had held the inn-keeper responsible.

Counsel for the other side contend that none of the evidence is before this court because the bill of exceptions is not in the transcript. This statement is true so far as the bill of exceptions is concerned, but it is not true so far as the conclusion drawn from the absence of the bill of exceptions is concerned. We believe that the evidence is entirely unnecessary for the consideration of any question raised by our brief, for the pleadings, the instructions of the court and the decision of the Supreme Court of Nebraska, are sufficient to raise every question argued by us. But though the bill of exceptions in its entirety is absent from the transcript, all essential facts of this case are before this court. The rules of the Supreme Court of Nebraska (Rule 12, paragraph 1, sub-division d, found on page 17 of the printed record), provides that when an assignment of error raises any question concerning the evidence, the assignment of error shall contain a concise statement of the evidence necessary to be considered by the court in connection with the question raised. The rule further provides that the statements so contained in the assignment of error shall be taken as true unless controverted by the other side. On pages 17 to 23 inclusive, of the printed record, and also on pages 41 and 42, will be found certain assignments of error made in the Supreme Court of Nebraska and contained in these assignments are statements of evidence which we think justify every statement of fact made in our main brief, and surely they contain sufficient evidence to raise every question which we have argued in this court.

The amended petition, upon which the case was tried, is found in the printed record on pages 1 to 4

inclusive, and it contains, among other averments, the following: (a) In paragraph three is found the allegation "That the defendant and each and all of his employees and servants in that behalf, negligently failed to awaken or give plaintiff notice of said fire, or *to do all in their power to save plaintiff*, and thereby and by reason of the hereinafter stated negligence of the defendant, the plaintiff was then and there injured and damaged by smoke and gases, and in attempting to escape from said hotel in order to avoid said danger." (b) In paragraph four is found the allegation, "That *the fire was not controlled* by defendant or his servants in that behalf, by reason of carelessness and negligence," also, "That the defendant was further negligent and careless by reason of the failure of defendant and his servants in that behalf to promptly do anything *to arrest the progress and volume of said fire.*" (c) In paragraph five is found the averment that the defendant was negligent in that neither "He nor his night watchman, nor any of his servants, did not awaken or arouse plaintiff or notify him of said fire, *nor did any of them do all in their power or anything to awaken or save plaintiff.*" (d) In paragraph six we find that the defendant is accused of negligence because he did not have in the office persons "To receive warnings of said fire, and to promptly convey warnings to the guests and to arouse and otherwise attend to the safety of said guests." (e) In paragraph seven occurs the express allegation that defendant was negligent in "Failing and refusing to respond to plaintiff's summons and *demand to be removed from said fourth floor.*"

The petition is full of averments to the effect that there was fire, smoke and gases all over the hotel, and that plaintiff has suffered an injury by these gases and

smoke, and the petition plainly shows that the premises were dangerous. How then can it be contended that the inn-keeper and his employees, with absolute and perfect safety to themselves, could have performed all these specific acts which the petition avers that they failed to perform? The gist of the petition is that Strahl was in a burning biulding in a dangerous position, occupying a room on the top floor, and by himself was unable to escape and that the inn-keeper and his employees failed to risk their lives to assist Strahl in making his escape. There is absolutely no justification for the claim made by defendant in error in his brief that the petition does not charge the failure to perform acts, the performance of which was accompanied by more or less danger to the person of the inn-keeper and his employees. But even this fact is immaterial, the inn-keeper and his employees had the right *to think* there was danger, and they were justified in making no effort *to save* Strahl.

The instructions of the trial court are found on pages 7 to 15 of the printed record, and among other things the jury were told (a) that the petition averred that the fire was not properly discovered and controlled, and a portion of the hotel was burned, thereby filling the halls with smoke and gases which endangered the lives of the guests; that the defendant and his employees failed to awaken and notify plaintiff of the fire; that the defendant and his employees failed to arouse plaintiff; failed to notify him of the fire; failed to respond to his demand to be removed from the fourth floor (instruction 1); (b) that the law (of Nebraska) required defendant to keep a watchman who should give warning to all guests in the event fire should break out and "In case of fire to do all in his power to save

guests and inmates" (instruction 2); (c) that the failure to perform this legal duty constituted negligence, though negligence was a question for the jury (instruction 2½); (d) that failure to awaken plaintiff, if it could have been done in time to rescue plaintiff by enabling him to descend to the lower part of the building by using the stairs or elevator, would be negligence (instruction 6); (e) that it was defendant's duty to have the watchman who, if reasonably in his power, should give warning of fire to and awaken plaintiff and notify him of the fire (instruction 8); (f) that failure to operate the elevator, if ordinary care for plaintiff's safety required the same, would constitute negligence (instruction 9); (g) that the inn-keeper must notify guests of fire as soon as possible, and use all reasonable means for that purpose, but that he owed no greater duty to plaintiff than to other guests, but he must proceed to notify the guests immediately, thereby leaving the inference that this notice must be given regardless of any possible danger to the inn-keeper or his employees (instruction 12).

In Nebraska negligence is always a question for the jury, but under these instructions the jury were plainly told that the statute imposed upon the inn-keeper, the night watchman and the other employees, the duty, in case of fire, to notify guests, to awaken them, to rescue them, to do all in their power to save the guests. The jury had the right, if it so desired, to find that the defendant was not guilty of negligence in failing to perform these acts, for in a case of negligence the jury is always permitted to find for the defendant, and the court has no right to instruct the jury that any specific act constitutes negligence *per se.* But under these instructions the court *permitted the*

jury to find defendant guilty of negligence if he or the watchman, or any employee, failed to awaken Strahl, failed to remove him from the fourth floor when he demanded to be rescued, failed to notify him of the fire, failed to do all in their power to save him harmless. The building was on fire, the halls were full of smoke and gases. A statute which imposes any active duty upon a person that requires him to remain in a burning building or to be in the halls full of smoke and gases, requires of such person that he risk his life to a greater or less extent. Whether or not the jury thought there was actual danger to the employees in doing any of these acts is all immaterial.

The instructions of the court, the averments of the petition and the decision of the Supreme Court, plainly raise the question which we have argued, for the statute imposes upon the inn-keeper and his employees the duty of performing acts which require them to remain in a burning building and to run greater or less danger to their persons. When fire breaks out in a hotel the inn-keeper and all of his employees, are entitled to take to their heels and to protect themselves. Their lives are just as important to the state as are the lives of the guests. The police power can compel the inn-keeper to take precautions against fire and failing so to do can make him liable, but it can not compel him and his employees to rescue or to attempt to rescue the guests from the fire and the statute places such a duty upon the inn-keeper and his employees, and such interpretation was given to the statute in this case by the petition, by the instructions of the court and by the Supreme Court.

Respectfully submitted,

EDGAR M. MORSMAN, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. .....

ROME MILLER,
Plaintiff in Error,

vs.

EMIL J. STRAHL,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

STATEMENT.

Plaintiff in error has not included in the transcript from the Supreme Court of Nebraska, or the printed record in this court, the bill of exceptions containing the evidence or any portion thereof. It follows that the facts of the case, so far as they are presented for consideration here, are those admitted by the pleadings (Transcript pp. 1 to 7, inclusive), and stated in the opinion of the Supreme Court of the State of Nebraska in its opinion (Transcript pp. 25 to 27, inclusive). We

challenge attention to the record in this respect for the reason that in the written assignments of error, filed by plaintiff in error, in the office of the Clerk of the Supreme Court of Nebraska, some quite extravagant claims, respecting the evidence contained in the bill of exceptions, were made. These assignments of error, made a part of the transcript and found in the printed record pp. 17 to 23, inclusive, are made the basis of a statement of the facts contained in the brief of plaintiff in error.

ARGUMENT.

It is conceded by plaintiff in error that the record in this case presents but one question, i. e., whether or not the state law as interpreted and applied at the trial of this cause contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States.

It is admitted in the brief and argument of plaintiff in error that the State of Nebraska may make rules and regulations governing the construction of hotels, providing for fire escapes and stairways, and make rules and regulations having reference to the performance of acts and the taking of precautions prior to the time fire breaks out. And the argument seems to concede that the State has the power to make the hotel keeper an insurer respecting the life and property of his guests. But it is urged that this law is invalid for the following reasons:

"A." Because it requires hotels containing more than fifty rooms, and being four or more stories high, to employ a watchman during the night time, and requires him to keep watch and guard against fire during specific hours, and to warn guests in the event of fire. And such duty is not imposed upon hotel keepers having less than fifty rooms, or being less than four stories in height.

"B." Because the statute devolves upon the keeper of such hotel, in the event of fire, the duty of giving notice to the guests and doing all in his power to save such guests and inmates from injury.

Touching the first suggestion, the well settled rule is that the Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances, both in the privileges and liabilities imposed. (Hayes vs. Missouri, 120 U. S. p. 68.) Following this rule, the State law allowing the state in capital cases a larger number of peremptory challenges to jurors in cities of over one hundred thousand inhabitants than in any other part of the state, was upheld as a valid exercise of legislative discretion.

In Barbier vs. Connelly, 113 U. S. 107, an ordinance of the City and County of San Francisco, prohibiting

the carrying on of public laundries and wash houses in the night time within certain prescribed limits, although it did not interefere with or forbid the prosecution of these industries outside these limits during the night, was upheld.

In McLane vs. Arkansas, 211 U. S. p. 546, it was held that a State Police Regulation of coal mines was not unconstitutional under the equal protection clause in the Fourteenth Amendment because it was only applicable to mines where more than ten miners were employed.

In Williams vs. Arkansas, 217 U. S. p. 79, a statute singling out certain classes of business and professions and imposing restrictions not imposed upon other classes of business and other professions was upheld. And in vindicating the well settled doctrine that "equal protection is not denied where the law operates alike upon all persons similarly situated," this court said:

> "It is settled that legislation which, 'in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment' (Barbier vs. Connolly, 113 U. S. 27); and when a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force, its extension to others whom it leaves untouched." Missouri, K. & T. Co., vs. May, 194 U. S. 267.

The legislature of Nebraska had a lawful right to conclude that the safety of guests in hotels having more than fifty rooms, and being four or more stories in height, required the service of a night watchman in the night time to guard against the outbreak of fire, and in the event of danger from that source, to warn guests of such danger. By the act in question, they required the employment of a watchman and defined his duties. The classification is neither arbitrary or unreasonable, but on the contrary, a salutary and proper exercise of the power to enact legislation designed to protect the traveling public.

The case of Atchison, Topeka & Santa Fe Railway Co. vs. Vosburg, decided by this court June 1st, 1915, and cited in the brief of plaintiff in error, amply illustrates the limit of this power. In that case the law classified the carrier and shipper alike, respecting the duties to be performed, but discriminated against the carrier and in favor of the shipper by imposing a penalty upon the carrier for a breach of the duty not imposed upon the shipper. Clearly, this denied to the carrier the equal protection of the laws, guaranteed by the Fourteenth Amendment, and the court so held, but that decision does not aid the plaintiff in error in this case.

Respecting the second contention, we understand the contention of plaintiff in error to be that while the legislature of Nebraska has the power to impose by law upon inn keepers, the duty of employing means de-

signed to prevent the outbreak of fire, or even to make the inn keeper absolutely liable as an insurer, it has no power to impose upon the inn keeper, any duty toward his guests after the fire breaks out. Because they say it may happen that it would be dangerous or perilous to attempt to warn the guests or to attempt to enable them to escape, and therefore, even in those cases, where the inn keeper or his servant have ample opportunity with perfect safety, to warn guests of their danger, and enable them to escape, they are not required to do so, and the legislature is powerless to impose that duty upon them. It is further urged that the statute requires the hotel keeper to do all in his power to save guests and inmates of his hotel from destruction by fire, makes a failure to comply with the requirements imposed a misdemeanor and provides for a criminal prosecution and the imposition of a fine in the event of a conviction. And it is said that the statute is so indefinite, in that it does not define or point out what efforts the inn keeper must make to warn his guest or enable him to escape, that it is not capable of enforcement under the rules applicable to criminal proceedings in courts of justice in this country. We think that it is not difficult to answer these suggestions, so far as they relate to the issues involved in this case.

We submit:

First. That the statute, as written, is simply declaratory of the common law as it existed before the enactment of the statute so far as civil liability is con-

cerned. The failure of the inn keeper to exercise reasonable diligence in and about notifying his guests of the presence of fire, and enabling him to escape therefrom, constituted actionable negligence in the absence of a statute.

Second. It is not enough that a state law as written, is capable of a construction that would render it repugnant to some provision of the constitution of the United States, to authorize this court to pronounce it invalid. If the law as construed by the courts of the state, does not offend against constitutional provisions, then it must be held valid here.

Tampa Waterworks Co. vs. Tampa, 199 U. S. 241; 50 L. Ed. 170.
Smiley vs. Kansas, 196 U. S. 447.
Soper vs. Lawrence, 201 U. S. 371; 50 L. Ed. 792.
Gatewood vs. North Carolina, 203 U. S. 531; 51 L. Ed. 305.
Maiorano vs. Baltimore & Ohio R. R. Co., 213 U. S. 268; 53 L. Ed. 792.

In Clancy vs. Barker, 71 Neb. 83, the Supreme Court of Nebraska declared the rule to be, "The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so." Of the law thus construed no just complaint can be made. This construction of the law is re-affirmed by that court in the case at bar. And the fear that a judgment declaring the law valid, will impose upon the inn keeper or his servants, danger of life or limb in yielding obedience to its provisions, is not warranted. Nor

was any issue of that kind presented or tried in this case. Plaintiff in error was charged with negligence in the following particulars:

"1. That the defendant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests, and that the employes of the defendant negligently and carelessly failed to be at their posts of duty to respond to the warnings given them and the defendant of the existence of the fire.

"2. That the defendant was further guilty of negligence in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung a fire gong on the fourth floor, or ring or cause to be rung a telephone in the room occupied by the plaintiff, or in any other way waken or arouse the plaintiff or notify him of the existence of said fire.

"3. That the defendant was guilty of carelessness and negligence in not giving or causing to be given any notice to plaintiff as to the location of the stairway leading from the fourth floor, and did not have or maintain a sufficient number of stairways; and that he was negligent in failing to operate the elevator leading to and from the fourth floor and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign or notice, indicating the location of the elevator. And,

"4. That plaintiff's room was provided with a rope furnished by defendant, which defendant represented could be used for the purpose of escaping from said room in case of fire, and that said

> rope so furnished as a means of escape was too small and was insufficient for the purpose for which it was intended, and that defendant negligently failed to give plaintiff proper directions for the use of said rope as a means of escape."

The evidence and the instructions of the court at the trial of this case, were limited to the issues thus presented. There is not a syllable of evidence in the record warranting the inference that the act of notifying the guests of the hotel of the presence of fire, and thereby enabling them to escape, was attended with the slightest danger, or even inconvenience. As stated by the Nebraska court, in its opinion.

> "It is undisputed that the smell of smoke was detected by one of the employes in the hotel about 1:30 a. m., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter might be buring there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts together with the testimony relating to the fire gongs, fire escape and the general conduct of appellant's agents were all properly submitted to the jury."

When it is considered that the constitutionality of the Nebraska statute, as construed and applied by the Nebraska courts in this case, is the only subject of inquiry here, it is clear that the objection made is untenable.

3. It is further urged that the Nebraska statute imposes a penalty upon the hotel keeper for a violation

of its provisions, and that the provision respecting the safety of guests and inmates is so indefinite that the penalty ought not to be enforced, and that for this reason, the law should be deemed invalid. It is not necessary in the case at bar, to determine whether that portion of the statute requiring the hotel keeper and watchman to do all in their power to warn and rescue guests, is enforceable under the penalty section. If excluded from the criminal section, it would still stand as the rule of civil conduct, for the penalty is simply an incident to the purpose for which the act was passed, and it cannot be said to be the inducing cause for the passage of the act, or that the failure of the penalty in this regard would render the statute otherwise unenforcible.

> "Breach of the statutory duty to keep bandages, oil, stretchers and blankets for the use of persons injured in the mine will give a right of action to an employee injured thereby, although the statute provides no penalty for its breach and provides no remedy for failure to comply with its terms and the primary injury was not due to negligence for which the mine owner was responsible." (Wolfe vs. Smith, 149 Ala. 457.)

In Wyatt vs. McCreary, 11 New York Suppl. 86, it is held that the fact that a part of a statute, making a person, violating its provisions, guilty of a misdemeanor may be unconstitutional, is not material in passing on the question of the right of civil action and remedy.

It will be time enough to consider whether or not the penal provisions of the Nebraska Inn keepers Act are enforceable when that question arises.

In conclusion, we submit that the legislative enactment complained of, is a valid and salutary exercise of the police power of the state. Barring specific requirements, all properly designed to promote the public health and safety, it does no more than declare the common law duty of the inn keeper with respect to his guests. The Supreme Court of the State of Nebraska has given the law a sensible and proper construction. As construed by that court, there is no danger that plaintiff in error will be compelled to endanger his life or that of his employe in performing the duties imposed upon him or them.

Touching a similar contention, in the case of United States vs. Kirby, 7 Wallace, p. 482, this court said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.
>
> "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted: 'That whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon, who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison, shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on

> fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

If the Supreme Court of Nebraska had not already so construed this statute as to eliminate the objection and the argument in support of it made here, this court applying well settled rules of construction would, we think, necessarily be compelled to so construe it as to sustain its validity.

The propositions of law presented in this case are so plainly determined adversely to the contention of plaintiff in error, by numerous decisions of this court, that we feel justified in urging that the court should reach the conclusion that the writ of error was prosecuted only for delay, and should impose the penalty provided by Rule 23 on account thereof.

Respectfully submitted,

H. C. Brome,
Clinton Brome,
H. S. Daniels,
Attorneys for Defendant in Error.

MILLER *v.* STRAHL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 458. Argued November 29, 1915.—Decided December 20, 1915.

Whether a state statute contravenes the constitution of the State does not concern this court.

When a person engages in a business that is subject to regulation by the State, such as hotel keeping, he undertakes to fulfil the obligations imposed on such business.

A State may prescribe the duties of hotel-keepers in regard to taking precautions against fire and to giving notice to guests in case of fire.

Rules of conduct must necessarily be expressed in general terms and depend upon varying circumstances—and a police statute requiring keepers of hotels to give notice to guests in case of fire is not lacking in due process of law because it does not prescribe fixed rules of conduct. *Nash* v. *United States*, 229 U. S. 373, followed, and *International Harvester Co.* v. *Missouri*, 234 U. S. 199, distinguished.

A police statute otherwise valid is not unconstitutional as denying equal protection of the law because applicable only to hotels having more than fifty rooms. There is a reasonable basis for classification of hotels based on number of rooms.

The statute of Nebraska of 1913, requiring keepers of hotels having over fifty rooms to keep night watchmen to guard against fire and to awaken guests in case of fire is not unconstitutional as depriving the keepers of hotels having fifty rooms or more of their property without due process of law or as denying them equal protection of the law because the act does not apply to keepers of hotels having less than fifty rooms; nor for denying due process of law because it does not prescribe an exact rule of conduct in case of fire.

97 Nebraska, 820, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Nebraska relative to duties and liabilities of hotel keepers in case of fire, are stated in the opinion.

Mr. Edgar M. Morsman, Jr., for plaintiff in error:

The trial court placed upon the statute an interpretation

which permitted the jury to hold plaintiff in error liable if they should find from the evidence that either he, as proprietor of the hotel, or any of his employés, had failed to do all in their power to save defendant in error unharmed from the fire.

The statute, or this interpretation thereof by the instructions of the court, is so indefinite that it fails to prescribe any fixed rule of conduct by which the inn-keeper can guide his actions and, therefore, the taking of life, liberty or property based upon an alleged violation of such a statute, to-wit: to do all in one's power, does not constitute due process of law. *Collins* v. *Kentucky*, 234 U. S. 634; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *State* v. *Mann*, 2 Oregon, 238; *Cook* v. *State*, 26 Ind. App. 278; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Brown* v. *State*, 137 Wisconsin, 543; *Tozer* v. *United States*, 52 Fed. Rep. 917; *R. R. Com.* v. *Grand Trunk*, 100 N. E. Rep. 852; *United States* v. *Reese*, 92 U. S. 214; *American School* v. *McAnnulty*, 187 U. S. 94; *Czana* v. *Board of Medical Sup.*, 25 App. D. C. 443.

The due process clause of the Federal Constitution prevents not only the taking of life and liberty, but also the taking of property without due process of law. The statute cannot be held unconstitutional as to the criminal penalty and be held valid so far as the civil liability is concerned. If the statute through its criminal liability deprives a person of life and liberty without due process of law, it must necessarily through the civil liability deprive a person of property without due process of law. The statute, so far as the Federal question involved is concerned, cannot be constitutional for the purpose of taking one's property and unconstitutional for the purpose of depriving one of life and liberty.

Among other things, the statute provides that the watchman, in case of fire, shall instantly awaken each guest and inform him of the fire. It further provides that